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90-1276

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ARTHUR FRANK MILLARD, PETITIONER

v

THE UNITED STATES, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED:

1. Whether under Section 459 of the Social Security Act (42 U.S.C. 659) [110a-111a], the United States was empowered to withhold pay of a federal officer based on a state wage assignment order [75a-80a], which on its face showed neither notice in the state, nor the officer's employment nor his residence nor his consent to suit in the state, nor his appearance in the proceeding, where the officer was employed and resided in a state without the forum state, and was precluded by the withholding from disputing the underlying claim and the jurisdiction of the forum state, except by appearing in that state at great distance, expense and inconvenience.

QUESTIONS PRESENTED (Continued)

2. Whether the wage assignment order [75a-80a] was enforced against the officer by the withholding in the state in which he receives his pay, so as to entitle him to collaterally attack the order in that state, where he did not participate in the underlying proceedings in the forum state.

3. Whether the wage assignment order [75a-80a] provided the United States a defense as a matter of law to the officer's complaint [96a-103a] supported by affidavit [81a-95a], alleging that the pay was withheld without notice nor opportunity to be heard and seeking recovery of the pay.

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DOCKET NO.

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THE UNITED STATES, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DECISIONS BELOW

Opinions delivered in the courts below are in the appendix to this petition, and are cited as follows:

Millard v United States,
16 Cl.Ct. 485 (1989).

DECISIONS BELOW
(Continued)

Millard v United States,

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JURISDICTION IN THIS COURT

Jurisdiction in the Supreme Court of the United States is invoked for the reasons below:

(i) The judgment to be reviewed was entered September 28, 1990 in the U.S. Court of Appeals for the Federal Circuit.

(ii) The U.S. Court of Appeals for the Federal Circuit denied a timely petition for rehearing on November 13, 1990.

(iii) The statutory provision for this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitution, Article I, Section 9, Clause 7 provides in part:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law..."

U.S. Constitution, Article IV, Section 1 provides in part:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such acts, records and Proceedings shall be Proved, and the Effect thereof."

U. S. Constitution, Article VI, Section 2 provides in part:

"This Constitution, and the Laws of the United States which shall be made in

Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. Constitution, Amendment One provides in part:

"Congress shall make no law ... abridging the freedom of speech, or of the ... right of the people peaceably to assemble, and petition the Government for a redress of grievances."

U.S. Constitution, Amendment Five provides in part:

"No person ... shall be deprived of life, liberty, or property, without due process of law ..."

U.S. Constitution, Amendment Fourteen, Section 1 provides in part:

"... No State ... shall deprive any person of life, liberty, or property, without due process of law ..."

The relevant provisions of the Social Security Act, Title IV-D, 42 U.S.C. 651-662 and the pertinent parts of implementing regulations, 5 C.F.R. 581 (1983), 20 C.F.R. 350, 363 (1984), 45 C.F.R. 301, 302 (1983) and 45 C.F.R. 303 (1985) are set forth in the appendix to this petition.

STATEMENT OF THE CASE

Petitioner is a U.S. Army officer residing in Georgia, and there receives military basic and retired pays, respectively under 37 U.S.C. § 1009 et seq. and 10 U.S.C. §§ 3911 and 3991. [49a-51a,83a,96a] On October 1, 1984 while on

active military duty in Georgia, Petitioner received his Army pay statement which showed a large deduction for the previous month. [51a] The only indication given for the deduction was the name of his ex-wife on the statement. [51a,83a] Petitioner protested to the Army Finance Center in Indianapolis, Indiana. [83a-85a] Subsequently, the Finance Center sent Petitioner copies of a Wage Assignment Order and Order Establishing Arrearages, issued by a California court and relied upon for the deductions. [51a,52a,75a-80a] The orders show the notice that Petitioner received of the underlying action at his Georgia residence, and that he did not appear in the California court [75a-80a]; the orders do not name a governmental entity as a party. [67a, 75a-80a] Petitioner asserted that the garnished debt was disputed, that he had no connection with California and requested

return of the pay. [53a,85a,86a] After unsuccessfully seeking relief at all Army management levels [86a], including its records correction board under 10 U.S.C. §§ 1552 [87a], Petitioner filed suit in the U.S. Claims Court [96a] under the Tucker Act, 28 U.S.C. 1491 et seq. The complaint alleged that the pay was taken without notice or opportunity to be heard. [96a-103a] In an affidavit before the Claims Court, Petitioner denied the underlying indebtedness and alleged an inability to appear in the California court due to economic hardship and military and family obligations in Georgia. [81a, 84a, 85a, 89a, 93a, 94a] On cross-motions for summary judgment, the Claims Court held for the Government, agreeing with its contention that the California court order was "regular on its face" under 42 U.S.C. 659 [110a-111a] and that no Constitutional violation occurred. [49a-74a]; 16 Cl. Ct.

485 (1989). The Claims Court also found that the order was "regular on its face" [61a], subject to attack only in California [66a] and that although an implementing regulation [5 C.F.R. 581.202(a) (1988)] [120a] requiring the naming of a garnishee was not followed, Petitioner had shown no actual damages and could not recover. [66a-70a]; 16 Cl. Ct. at 490-91. After timely motion and denial of rehearing [74a], Petitioner appealed to the U.S. Court of Appeals for the Federal Circuit. The court of appeal affirmed [1a,45a], finding that the California order did not require the naming of a garnishee [32a]; the court also denied rehearing [46a] and declined rehearing in banc. [48a] Throughout the litigation, the wage withholding has continued. [53a]; 16 Cl. Ct. 485, 487 (1989).

This petition followed and addresses the questions expressly raised and left

open by this Court footnote 5 in the leading case, United States v Morton, 467 U.S. 822 (1984), reversing, Morton v United States, 708 F.2d 680 (Fed.Cir.1983).

SUMMARY OF ARGUMENT

This petition is a plea for 5 million federal employees to be restored to the right in domestic-relations litigation to be heard prior to enforcement of an unconsented foreign ex parte money judgment, a right taken away by the decision below. The decision, adopting agency interpretation of the legislation at issue, approves wage withholding on such judgments, prior to domestication in the state in which the employee is employed, enforcing the judgment in that state. Title IV-D, Social Security Act, 42 U.S.C. 651-662. [104a-113a] Withholding

in this manner precludes the employee from disputing the underlying debt and the jurisdiction of the foreign court, except by appearing there, however distant and inconvenient. Millard v United States, ___F.2d__,(Fed.Cir.1990). [1a,45a,85a,94a] A governing regulation precludes agency inquiry into personal jurisdiction. [5 C.F.R. 581.305 (f) (1984)] [121a] In cases not involving federal personnel, however, Due Process and Full Faith and Credit require a hearing in the foreign-judgment debtor's state of residence or employment prior to enforcement in that state of the judgment against him. See, Vanderbilt v Vanderbilt, 354 U.S. 416 (1957); May v Anderson, 345 U.S. 528 (1953); and Estin v Estin, 334 U.S. 541, 548-549 (1948). The right to resist legal process from a foreign domestic-relations court and to be heard to object to enforcement of the same in the state

courts of one's residence is recognized throughout Title IV-D, supra, [108a,109a] but erroneously rejected in federal agencies and by the Federal Circuit decision challenged here. In briefest terms, the court below has resurrected aspects of Harris v Balk [198 U.S. 215 (1905)] overruled in Shaffer v Heitner, 433 U.S. 186, n.39 (1977). [3a, 28a, 41a] The court below must be corrected so that federal employees may once again be heard in their local state courts in parity with their domestic adversaries, before federal pay is withheld.

A domestic-relations judgment or wage garnishment must be "regular on its face" under Title IV-D, Section 459 (f) [42 U.S.C. 659 (f)] [111a] to receive federal recognition; "regular on its face" means "nothing on its face that provides reasonable notice that it is issued without authority of law". Morton, supra,

467 U.S. 822, n. 10. "Regular on its face" excludes legal process which on its face does not conform with the law of the state from which it issued, and therefore would not be entitled to full faith and credit outside the state. Legal process not based on notice in the territory of the state cannot on its face conform to the law of the forum state, and cannot receive full faith and credit elsewhere on its face. Vanderbilt, supra. May, supra. Estin, supra. Accordingly, such judgments are subject to collateral attack upon any attempted enforcement. Rule 60(b), F.R.Civ.P. O.C.G.A. 9-11-60; 9-12-16 [146a-148a]; 7 Moore's Federal Practice, Sec. 60.25 [2] (1986).

For the above reasons, the instant wage assignment order issuing from California against a Georgia resident, is not regular on its face. It is also not regular on other grounds, neither naming a

governmental entity nor showing compliance with two underlying California statutory requirements, a petition signed under penalty of perjury [134a] and a declaration of written notice [136a]. Ackerman v Ackerman, 517 F.Supp. 614 (SDNY,1981), aff'd 676 F.2d 898 (2d Cir. 1982). No presumption of regularity applies where the order is against a nonresident and lies in an area of limited jurisdiction. Galpin v Page, 85 U.S. (18 Wall.) 350,371 (1874). In re Marriage of Davis, 68 Cal.App.3d 294, 300, 137 Cal.Rptr. 265, 269 (1977)(Divorce is limited jurisdictional area).

The court below omitted any consideration to its own controlling precedent, which found a Fifth Amendment violation in the withholding of an Air Force officer's pay in Alaska where he resided and received his pay, based on an Alabama domestic-relations garnishment

following notice in Alaska and the officer's default of appearance in Alabama. Morton v U.S., 708 F.2d 680 (Fed.Cir.,1983), rev'd on other grounds, U.S. v Morton, 467 U.S. 822 (1984). The unanimous reversal came because Morton's complaint failed to allege a Constitutional violation, and he did not dispute the government's contention that the Alabama garnishment was "regular on its face." See, United States v Morton, 467 U.S. 822, 825 & n. 5.

The decision below failed to consider the effect of the Supremecy Clause, and therefore does violence to sovereign immunity: sanctioning state legal process against the United States without naming it or a governmental entity as a party, contrary to federal statute and regulations; nor should the immunity waiver be broadened beyond its "regular on its face" limitation. United States v

Mitchell, 445 U.S. 535, 538 (1980). Loftin v Rush, 767 F.2d 800, 809 (11th Cir. 1985). 42 U.S.C. §§ 659 (f), 661 (1984); 5 C.F.R. 581.202 (a) (1983). [120a] Title IV-D has supremacy over any conflicting state law and its implementing regulations having force of law (42 U.S.C. §§ 659(f), 661) are likewise supreme. Accordingly, the requirement that a governmental entity be named prevails over conflicting California law. U. S. Const., Art. VI, Section 2. Social Security Act, Title IV-D, 42 U.S.C. 651-662. 5 C.F.R. 581.202 (a) (1983). See, McCarty v McCarty, 453 U.S. 210 (1981).

In further offense to the Supremacy Clause, the decision below fails to see that the Due Process Clause and Title IV-D prevail over conflicting California law as to the effect of its law without the state. In interstate domestic-relations cases, Title IV-D, supra, and implementing

regulations require consideration to the laws of both states and use of reciprocal enforcement remedies. 42 U.S.C. 651-662, 5 C.F.R. 581 (1983); 45 C.F.R. 301 et seq. (1983). Therefore, to the extent California law might enable its courts to render and enforce a support order against an unconsenting nonresident, based on notice without California, such law conflicts with Due Process and Title IV-D; an order under such law is void unless proven otherwise in a hearing preceded by lawful notice. U. S. Const., Art. VI, Section 2; Amdt. XIV. Social Security Act, Title IV-D, 42 U.S.C. 651-662. 5 C.F.R. 581 (1983); 45 C.F.R. 301-302 (1983); 45 C.F.R. 301-307 (1985). Lynde, supra. Vanderbilt, supra. See also, Kulko v Superior Court of California, 436 U.S. 84, 99, 100 & n. 15 (1978) (Due Process precluded assertion in California

of personal jurisdiction over New York resident in domestic-relations action, where reciprocal enforcement remedies were not used).

The decision below does violence to the Full Faith and Credit Clause and 28 U.S.C. 1738, in enforcing a California judgment in Georgia, without domestication of the judgment in Georgia. Lynde v Lynde, 181 U.S. 183 (1901). M'Elmoyle v Cohen, 38 U.S. (13 Pet. 312), 10 L.Ed. 177 (1839); Nelson v Nelson, 327 S.E.2d 529 (Ga.App.1985). O.C.G.A. 9-11-58 [146a]

A private employer would be liable under the same circumstances, because a judgment in violation of due process is no judgment at all. Griffin v Griffin, 327 U.S. 220 (1946). Vanscoy v Neal, 322 S.E.2d 37 (W.Va.1984). 7 Moore's Federal Practice, Sec. 60.25 [2] (1986). 6 Am. Jur. 2d, Attachment and Garnishment Sec. 400.

The decision below creates unacceptable state-federal conflict, as one state has enacted a criminal statute prohibiting a private employer from enforcing a foreign garnishment against wages earned in that state, until domesticated in the state. South Carolina Statutes 15-39-420. [131a,132a] See also, O.C.G.A. 18-2-51. [148a]

The case at bar can be decided on statutory grounds as the wage assignment order is not regular on its face as the statute requires. The irregularity of the order is demonstrated by apparent constitutional violations on its face under the Appropriations, Full Faith and Credit, and Supremacy clauses, Amendment One, and the Due Process clauses of Amendments Five and Fourteen in the U.S. Constitution. Morton v U.S., 708 F.2d 680 (Fed.Cir.,1983), rev'd on other grounds, U.S. v Morton, 467 U.S. 822 (1984).

McCarty, supra. Kulko, supra. Vanderbilt, supra. Griffin, supra. Lynde, supra. M'Elmoyle, supra. Harrison v Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir.1986). Nelson, supra.

Granting relief pursuant to this petition will burden government no more that that already borne by private employers. Neither will enforcement of child and spousal support obligations be impaired, because Title IV-D created and funds state agencies in all states [and U.S. Territories; see, 45 C.F.R. 301.1 (1983)] for that specific purpose. This petition asks for little more than stopping federal agencies from doing unlawfully that which state Title IV-D agencies are chartered and equipped to do lawfully.

ARGUMENT

1. Background of the Statute.

"The whole subject of the domestic relations of husband and wife ... belongs to the laws of the States and not the laws of the United States..." McCarty, supra, 453 U.S. at 220 (1981). Similarly, "garnishment is purely a creature of state law." [3a, quoting from Harris v Balk, 198 U.S. at 222)].

The federal government involved itself in domestic-relations and garnishment in the 1970's through the Aid to Families with Dependent Children (AFDC) program under Title IV-A of the Social Security Act. 42 U.S.C. 601 et seq. AFDC costs were perceived to be caused substantially by absent and noncontributing parents. Accordingly, Title IV-D of the Act created and funds a cooperative state-federal support

enforcement program. 42 U.S.C. 651-662. Title IV-D requires each state to have a support enforcement agency and program, and to cooperate with other states through uniform reciprocal support enforcement acts (i.e., URESA). 42 U.S.C. 654 (4)(B). The program includes establishing paternity and collecting child support and spousal support. [45 C.F.R. 302.15 (a) (1) (ii), 302.31 (a), 305.24 (1983)] The program requires that states provide for the party defending a claim to be heard in the state where he resides. [108a] 45 C.F.R. 302, 303.7, 305.32(d) (1983). Where reciprocal remedies are ineffective, upon certification of the Health and Human Services Department, access to the federal courts is provided. 42 U.S.C. 660. [112a] 45 C.F.R. 303.73 (1983). Federal funding is allocated to the states based on amounts collected. 42 U.S.C. §§ 652(c), 655, 657. 45 C.F.R. 303.52 (1983). In

cases where two states are involved, each is entitled to a share of funding. 42 U.S.C. 658 (b); 45 C.F.R. 303.52 (c) and (f) (1983). The state agency must provide its services to all residents of the state, whether or not AFDC recipients. 45 C.F.R. 302.33 (1986).

2. The Order is Not Regular On Its Face.

Obvious nonamendable defects appear on the California wage assignment order relied upon by the government [75a-80a], and therefore it is not "regular on its face" as required by the sovereign immunity waiver. 42 U.S.C. 659. No presumption of regularity applies where the order is against a nonresident and lies in an area of limited jurisdiction. Galpin, supra, 85 U.S. at 371. In re Marriage of Davis, supra. "Regular on its

face" means "nothing on its face that provides reasonable notice that it is issued without authority of law". Morton, supra, 467 U.S. 822, n. 10. The same definition is in related legislation, the Uniformed Services Former Spouses Protection Act and its regulation. 10 U.S.C. 1447 (10); 32 C.F.R. 63 (1985). See, also, Allison v County of Ventura, 68 Cal.App.3d 689, 137 Cal.Rptr. 542 (1977).

a. The Order Is Defective On Its Face As No Governmental Entity Was Named.

Contrary to the sovereign immunity waiver and implementing regulation, the California order fails to name a governmental entity, and is therefore fatally defective. 42 U.S.C. 662(e); 5 C.F.R. 581.202(a). The court below fails to note that the regulation has the force of law [42 U.S.C. 661], and under the Supremacy Clause of the U.S. Constitution,

takes precedence over any California law to the contrary. "The sovereign's 'procedural immunity' has been waived; since the enactment of 42 U.S.C. Sec. 659(a)...the government can be **named** (emphasis added) as a party in specific garnishment actions against its employees ... Loftin's proffered interpretation of 42 U.S.C. Sec.659(a) would do violence to the principle of sovereign immunity..." Loftin v Rush, 767 F.2d 800, 809 (11th Cir. 1985)(Held: 42 U.S.C. 659 does not authorize payment of default judgments entered against the United States pursuant to state law). Even in the absence of the regulation's statutory origin, adherence to it is constitutionally required. American Farm Lines v Black Ball Freight, 397 US 532 (1970). Service v Dulles, 354 US 363 (1957). Accardi v Shaughnessy, 347

US 260 (1954). The court below also overlooks California's standard form requiring that a garnishee be named. The form is depicted in Cal.Civ.Proc.Code 706.030 et seq. (West). Obviously absence of a named garnishee is a nonamendable defect precluding facial regularity. See, Rule 60, F.R.Civ.P.

b. The Order Fails To Comply With California Law.

The California statute relied upon by the court below requires a supporting affidavit prior to issuance of a wage assignment, but none was made. Cal. Civil Code 4701 (b) (2) (1983). [135a,136a] Accordingly, the order is void. Galpin, supra. Ackerman, supra.

c. The Order On Its Face Discloses Apparent Due Process Violation.

The federal pay at issue is constitutionally protected property, and within the due process clauses of the Fifth and Fourteenth Amendments. Board of Regents of State Colleges et al. v Roth, 408 U.S. 564 (1972). A domestic-relations garnishment based on extra-territorial service of process against a nonappearing and nonconsenting nonresident creates an apparent violation of due process and cannot be "regular on its face." Kulko, supra. Vanderbilt, supra. May, supra. Estin, supra, Griffin, supra. Galpin, supra. Lynde, supra. M'Elmoyle, supra. Federal agencies cannot enforce such garnishments. 42 U.S.C. 659. A layman with minimal training could have easily seen this defect on the face of the California wage assignment order at issue.

Additionally, Title IV-D recognizes the right of a support obligor to be heard in the state where he is employed, requiring all states to enact and use reciprocal enforcement remedies. 42 U.S.C. 654 [108a]; 45 C.F.R. 303 (1985) [126a-128a]. Section 654 and implementing regulations require states to provide for the party opposing the claim to be heard in the courts of the state where he resides. 45 C.F.R. 302 (1983). 50 F.R. No. 90, pp. 19611, 19612, May 9, 1985; 45 C.F.R. 303.100(g)(1985). See, 120 Congr. Rec. (House) 41808-41815 (1974). O.C.G.A. 19-11-40 et seq. and Cal. Civ. Proc. Code 1650 (West, 1982 & Supp. 1985).

The decision below irreconcilibly conflicts with Kulko, supra, and with Title IV-D, inhibiting if not eliminating use of reciprocal remedies where the putative obligor is federally employed. Under Title IV-D, supra, funding is tied

to the states' performances in collecting support money. 42 U.S.C. §§ 652(c), 655, 657. 45 C.F.R. 303.52 (1983). Therefore, states having large federal populations lose disproportionate funding under the practices approved by the court below. McCarty, supra, (California property law in conflict with federal survivor benefit plans violated Supremacy clause). Under the Full, Faith and Credit, Supremacy and Due Process Clauses, use of reciprocal remedies is demanded under the sovereign immunity waiver here. U.S. Const. Art.IV,Sec.1; Art VI, Sec.2.; Amdt. V; Amdt. XIV, Kulko, supra. Morton, supra, n. 5 and cases cited thereat, 467 U.S. at 828. 42 U.S.C. 659. See also, Insurance Corp. of Ireland v Compaignie des Bauxites de Guinee, 456 US 694 (1982), and World-Wide Volkswagen Corp. v Woodson, 444 US 286, 292 (1980).

3. California Civil Code 4701 Is Unconstitutional.

On its face [134a] and as applied, California Civil Code 4701 violates the Fourteenth Amendment Due Process clause for failing to provide prior notice of a wage assignment to the obligor and opportunity for him to be heard. The record fails to show prior notice of a wage assignment. Rather, absence of notice is shown. [83a,90a,91a] The statute also allows more than one employer to be served with a wage assignment order, thereby subjecting the employee's pay to being garnished more than once for a single obligation. Lugar v Edmondson Oil Co., 457 U.S. 922 (1982). North Georgia Finishing, Inc. v DiChem, Inc., 419 U.S. 601(1975). Fuentes v Shevin, 407 U.S. 67 (1972). Sniadach v Family Finance Corp., 395 U.S. 337 (1969). Diotte v Blum, 433 F. Supp. 676 (E.D.N.Y., 1977). To the

extent the United States relied on Civil Code 4701 in withholding Petitioner's pay, his rights under the Fifth Amendment were violated also. Bolling v Sharpe, 347 U.S. 497 (1954).

4. Petitioner Was Denied Reasonable Notice and Opportunity to Contest the Wage Assignment Order.

The record shows that Petitioner's only notice of the wage assignment order was after his pay had already been withheld by the Army Finance Center. [83a] Then, his only opportunity to attack the order was to do so in the issuing California court. [41a,88a,94a] although he resided and was employed in Georgia. These facts demonstrate lack of reasonable notice and opportunity to be heard. Lugar, supra. North Georgia Finishing, Inc., supra. Fuentes, supra. Sniadach, supra. Morton v U.S., 708 F.2d 680 (Fed.

Cir.,1983), rev'd on other grounds, 467 US 822 (1984).

The court below failed to recognize [24a] that due process, especially in domestic-relations claims, requires no less protection after judgment than before. North Georgia Finishing, Inc., supra. Finberg v Sullivan, 634 F.2d 50 (3d Cir.1980). Betts v Tom, 431 F.Supp. 1369 (D.Haw.1977). Coursin v Harper, 225 S.E.2d 428 (Ga.1976). City Finance Company v Winston, 231 S.E.2d 45 (Ga.1976). Vanscoy, supra.

5. Petitioner Was Denied Opportunity to Object to California Jurisdiction.

Petitioner's Complaint [96a-103a] and uncontradicted Affidavit [85a,92a-94a] show that the garnished debt is disputed but that he was unable to assert his defenses in California; and that he is a

Georgia resident and did not participate in the California proceedings. Although Petitioner had defenses procedurally [i.e., Kulko, supra.] and on the merits [85a,92a,93a], they were never heard because of the withholding complained of here. [96a-103a] Such defenses need not be shown in this litigation, being matters for a state court in any enforcement proceeding under state laws. 5 C.F.R. 581.102(g) (1983). State of Washington ex rel. Burton v Leyser, 241 Cal.Rptr. 812 (Cal.App.1987). The federal withholding and its preclusion of Petitioner from being heard to object in the state of his residence to the jurisdiction of the California court, were in violation of the Fifth Amendment. Morton, supra, 467 U.S. at 828 n. 5. Kulko, supra. Vanderbilt, supra. May, supra. Estin, supra. Griffin, supra. Morton v U.S., 708 F.2d 680 (Fed.Cir.,1983), rev'd on other g'nds, 467

US 822 (1984). Significantly, this Court in Morton, supra, gave this admonition in footnote five:

"This is however the only ground on which respondent attacks the enforcement of the writs of garnishment. Thus, no question is raised concerning the sufficiency of the notice and opportunity to contest the garnishment that respondent received prior to the execution of the writs, see generally Lugar v Edmondson Oil Co., 457 U.S. 922 (1982); North Georgia Finishing, Inc. v Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v Shevin, 407 U.S. 67 (1972); Sniadach v Family Finance Corp., 395 U.S. 337 (1969); and in particular no question is raised as to whether respondent was afforded an adequate opportunity to contest the

jurisdiction of the court issuing the writ in the jurisdiction where the writ was enforced, see generally Vanderbilt v Vanderbilt, 354 U.S. 416 (1957); May v Anderson, 345 U.S. 528 (1953); Estin v Estin, 334 U.S. 541, 548-549 (1948); Griffin v Griffin, 327 U.S. 220 (1946)." 467 U.S. at 828.

This petition seeks to raise the issues Colonel Morton omitted, and to protect the rights of federal employees.

6. As Applied, 42 U.S.C. 659 Violates Free Access to the Courts.

Regardless of reciprocal support enforcement remedies, a person similarly situated to Petitioner and employed in the private sector, has a right to an evidentiary hearing in his local courts to defend against enforcement of an

unconsented money judgment rendered in a foreign state. Vanderbilt, supra. O.C.G.A. §§ 9-11-60 [148a] Toledo Center Floor Covering, Inc. v Richfield Carpet Mills, Inc., 336 S.E.2d 320 (Ga.App.1985). Solely because of sovereign immunity and Petitioner's federal employment, he was denied access to injunctive and other relief from the courts of his state of employment and residence, in violation of the First, Fifth and Fourteenth Amendments to the U.S. Constitution. Lugar, supra. North Georgia Finishing, Inc., supra. Harrison, supra. See, Overman v U.S., 563 F.2d 1287, 44 ALR Fed. 485 (1977). The court below [23a,38a] overlooks or misapprehends this right, instead reviving aspects of Harris v Balk, supra, overruled in Shaffer v Heitner, supra, 433 U.S. at 212, n. 39.

7. 42 U.S.C. 659 Denies Substantive Due Process and Equal Protection.

The statute operates arbitrarily and unequally, first among federal agencies, and second, according to whether a marital-property claim is made with a support claim, and third, against federal employees generally.

One agency, the Railroad Retirement Board, considers the laws of both the forum and enforcing states in interstate domestic-relations garnishment actions. See, 20 C.F.R., Parts 350 and 363 (1984). [122a-124a] The regulations show that the Railroad Retirement Board interprets 42 U.S.C. 659 in the manner advanced in this petition; that is, that domestic service of process issued by the court of the state where the employee lives and works is required and that the employee is entitled to any benefits of that state's

laws, including the right to be heard and any garnishment exemptions in effect. In denying Petitioner's right to be heard in the courts of his state, based on Army rather than Railroad employment, the pay withholding complained of deprived him of Equal Protection and Due Process. Orr v Orr, 440 US 268 (1979). Frontiero v Richardson, 411 US 677 (1973). Because fundamental rights are at stake, the Government must show a compelling interest, which it cannot do. California Motor Transport Co. v Trucking Unlimited, 404 U.S. 508, 510 (1972). McCarty, supra.

The statute (42 U.S.C. 659) as applied arbitrarily discriminates in favor of federal employees against whom a marital-property claim has been made. Sovereign immunity has been waived to marital-property division claims by the Uniformed Services Former Spouses' Protection Act. 10 U.S.C. 1408, 1447-50,

1072, 1076, 1086 (1982). [114a-118a] Under the Spouses' Act, legal process of a state cannot receive federal recognition if the state's jurisdiction is not based on residence or domicile within the territory of the state or consent of the federal serviceman. 32 C.F.R. 63.6(1984) [125a]

The Spouses' Act and implementing regulation provide an opportunity to be heard where a marital-property claim is asserted with a support claim. 10 U.S.C. 1408, 1447-1450 et seq. 32 C.F.R. 63 (1985). Absence of such right under 42 U.S.C. 659 violates equal protection and due process. Orr, supra. Frontiero, supra.

As applied, the statute also discriminates arbitrarily against federal employees, with respect to persons who are privately employed. Orr, supra. Frontiero, supra. Kulko, supra, Vanderbilt, supra, May, supra, Estin, Griffin, supra.

8. The Appropriations Clause Was Violated.

Disbursement of public funds pursuant to the California order violates the Appropriations Clause of the U.S. Constitution which provides that money may be paid out only as authorized by statute. U.S.Const.,Art.I,Sec.9,Cl.7. O.P.M. v Richmond, ___U.S. ___, 1990 WL 75263 (June 11,1990). FHA v Burr, 309 U.S. 242, 244 (1940). Buchanan v Alexander, 45 US (4 How.) 19, 20 (1846). See also, Anti-Deficiency Act, 31 U.S.C. 665(a)(1970); 31 U.S.C. 1301(a)(1982).

9. A Private Employer Would Be Liable.

A private employer would be liable here. Vanscoy, supra. "The courts are agreed that if the judgment in a garnishment proceeding is void, as, for

example, where there is no jurisdiction acquired by the court, payment by the garnishee is no protection to him against a subsequent action by his creditor, or the creditor's assignee, to recover the debt." 6 Am. Jur. 2d, Attachment and Garnishment, Sec. 400. The California order, being contrary to due process, is a nullity and no defense to this suit. Morton, supra, n. 5, and cases cited therein, 467 U.S. at 828. Kulko, supra. Lynde, supra. Galpin, supra. O.C.G.A. 9-12-16. 7 Moore's Federal Practice, Sec. 60.25 [2]. In order to immunize a private employer from liability, the garnishment must be "regular on its face", thereby entitled to Full Faith and Credit in the state where the employee resides. Art. IV, U.S. Const., Sec 1. Act of 1790, 28 U.S.C. 1738. The order at bar could not receive such credit on its face. Kulko, supra. Vanderbilt, supra. Title IV-D,

supra. Moreover, by its own terms the order [79a] is not final and therefore could not receive Full Faith and Credit for that reason. 28 U.S.C. 1738. At any event, the burden is on the party seeking to enforce the foreign judgment to prove jurisdiction. Van Buskirk v Great American Bank of Broward County, 332 S.E.2d 394 (Ga.App.1985). Dunn v Blair, 328 S.E.2d 227 (Ga.App.1985). Hartsog v Robinson, 156 S.E.2d 141 (Ga.App.1967). Lurey v Jos.S.Cohen & Sons Co,Inc, 71 S.E.2d 689 (Ga.App.1952).

10. Petitioner Need Not Prove Damages.

If the federal agency had followed governing law and regulations, the withholdings complained of would not have occurred because Petitioner would have prevailed in the courts of his state of

residence and employment if he had been allowed to present his defenses procedurally and on the merits. "A party attacking a judgment as void need show no meritorious claim or defense or other equities on his behalf; he is entitled to have the judgment treated for what it is, a legal nullity." 7 Moore's Federal Practice, sec.60.25[2] (1986). Prejudice and actual damages must be presumed, however, and the government should bear the burden of proof that Petitioner was not damaged by its violations. Under 42 U.S.C. 659 and 5 C.F.R. 581.305 (f), the issue of personal jurisdiction cannot be examined. It is now impossible to know what ruling would have issued from the Georgia courts if Petitioner had been able to litigate the issue of personal jurisdiction there. No one could ever show that the error was harmful under these circumstances. "If there is to be

such a showing to establish the defense of harmless error on defendant's part, it would more fairly belong to defendant--the party guilty of the mistake in the first place." Skinner v US, 594 F.2d 824, 831 (Ct.Cl.1979).

Conclusion

The decision below does incalculable violence, to domestic-relations rights of all federal employees, to the nationwide state-federal child support enforcement program created and funded by the legislation under review, [Title IV-D, supra,] to sovereign immunity, and to settled precedent in this Court.

The decision below works unreasonable and unnecessary hardship and oppression on

all federal personnel who may be required to defend a domestic-relations claim. Now they must make their defense in any forum chosen by the opposing party, however distant or inconvenient, and are deprived of access to their local state courts. This result, particularly in paternity claims, invites uncontrollable fraud which Congress never intended. As Title IV-D provides for each party in a domestic-relations support dispute across state lines to be heard in the courts of their respective states, the balance of access to the courts has been tragically disrupted for approximately 5 million federally employed Americans. In contrast, privately employed persons are assured of such access by precedent in this Court and by the absence of immunity in private employers to suit in a state court wherein a foreign judgment can be collaterally

attacked. Federal employment therefore will be a distinct liability in defending domestic-relations litigation across state lines, as the availability of collateral attack has been effectively taken away. This should not be.

The decision will disrupt the nationwide support enforcement program created and funded by Title IV-D, inasmuch as a state receives federal funds for participation with another state in collecting support. 42 USC 658 (b). If the decision stands, states having large federally employed populations stand to lose substantial funding, as those states will no longer be involved in interstate claims against those employees. The decision below reviewed only one section of Title IV-D, and failed to construe the legislation as a whole, therefore arriving at this blind and disastrous result.

The decision below is a dangerous precedent for sovereign immunity, exposing the United States to suit and liability in state courts, without being named as a party and contrary to federal statute and regulation having force of law and supremacy over the state law relied upon below. The decision below broadens sovereign immunity beyond the waiver, which requires legal process to be "regular on its face" to penetrate immunity. The decision abandons the "regular on its face" limitation, instead construing the waiver to include a "blanket wage assignment which in its regular form is directed generically to any 'employer'" [29a] against an unconsenting nonappearing nonresident. The United States has not waived sovereign immunity to any such order. Loftin, supra. 42 USC 659. To be "regular on its face", legal process must be based on notice in

the state. Kulko, supra, Vanderbilt, supra, May, supra, Estin, Griffin, supra. As divorce is as an area of limited jurisdiction, legal process must affirmatively disclose facts showing its validity. Galpin, supra. In re: Marriage of Davis, supra. Instead, the court below indulges in a presumption that "minimum contacts" support any legal process a state might issue. The immunity waiver, however, requires that legal process on its face show the jurisdiction of the court [42 USC 659]; this means that the process on its face must show notice in the rendering state. Kulko, supra, May, supra, Vanderbilt, supra, Estin, supra. Griffin, supra.

A real and unsolvable dilemma in federalism has been loosed, as one state's law makes criminal the federal agency conduct approved below. In South Carolina an employer commits a misdemeanor by

withholding wages earned in the state pursuant to a foreign judgment not made a judgment in South Carolina. [131a,132a]. The United States cannot engage in wage withholding under 42 USC 659 any differently than a private employer, and likewise must comply with the law of the state in which the employee receives his pay. The decision below mistakenly assumes that the laws of the state of employment can be ignored. This erroneous conclusion results from failure to understand that garnishment is purely a creature of state law, and that therefore, a garnishment has to issue from the state in which the employee receives his pay. Lynde, supra. M'Elmoyle, supra. Title IV-D; 45 CFR 301 et seq. It is true that if the employee relocates to a different state, a garnishment must issue from the gaining state; however, that task is exactly what the Title IV-D agency is

equipped and chartered to deal with. In this respect, mobile federal support obligors create no different problems than mobile private-sector obligors.

Flying in the face of Lugar, supra, North Georgia Finishing, Inc., supra, Fuentes, supra, and Sniadach, supra, the decision below approves the taking of property without notice nor hearing. The decision assumes that notice and hearing are unnecessary because a judgment had issued previously. This reasoning is fallacious because the underlying judgment [75a-77a] had also issued without notice nor opportunity to be heard. Moreover, Due Process requires notice and hearing in enforcement of support obligations in domestic-relations cases even after judgment. Griffin, supra; Title IV-D, supra; Coursin, supra. The lesson of Griffin and its progeny, recognized in the Act under review, was overlooked below.

Carried to its logical conclusion, the interpretation below of 42 U.S.C. 659 would allow a Samoan prostitute to seize the wages of a federally-employed Maine resident who had never left his home state during his lifetime; she need only allege in a Samoan court that she has a family relationship with the employee and is owed money. Upon default of the employee, a resulting judgment will be seen as "regular on its face" by the employee's agency and cause part of the employee's pay to be sent to Samoa. Surely, such an outrageous outcome and injustice to federal personnel cannot be tolerated.

The decision below is so offensive to the personal lives of so many people, so unfair to one side in litigation unrelated to any federal interest, and so contrary to the accepted and usual course of judicial proceedings as to demand this Court's supervisory powers.

May God bless the United States of America and this Honorable Court.

WHEREFORE, Petitioner prays that this Petition be granted.

Respectfully,

ARTHUR FRANK MILLARD
Petitioner, Pro Se

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
89-1461

ARTHUR FRANK MILLARD,
Plaintiff-Appellant,
v
THE UNITED STATES,
Defendant-Appellee.

Decided: September 28, 1990

Before NIES, Chief Judge,* BENNETT Senior Circuit Judge, and Archer, Circuit Judge.

NIES, Chief Judge.

Arthur Frank Millard, now a retired member of the United States Army, appeals from the judgment of the United States Claims Court, Millard v United States, 16 Cl. Ct. 485 (1989)(Wiese, J.), granting summary judgment in favor of the government on Millard's claim under the Back Pay Act[1] for the part of his monthly

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* Chief Judge Nies assumed the position of Chief Judge on June 27, 1990.

[1] 5 U.S.C. 5596 (1988).

salary which the government paid to his former spouse pursuant to a wage assignment order for child support and alimony issued by the Superior Court of California, County of San Francisco. California wage assignment for support is a type of garnishment to which the United States has consented to subject itself by 42 U.S.C. §659(a)(1988). We affirm.

I

42 U.S.C. §659

Wages Due From the United States Are Subject To State Court Legal Process For Child Support and Alimony Payment

Garnishment is a legal proceeding brought by a creditor (garnishor) of a person (the debtor) against a third party (garnishee) to obtain property of the debtor in the hands of the third party to satisfy the debt owed the garnishor.

Harris v Balk, 198 U.S. 215, 226 (1905). Garnishment is purely a creature of state law. Id. at 222. Such process is routinely provided by state law for enforcement of court-ordered child support and alimony (a judgment debt) and may be used to reach wages of the judgment debtor in the hands of an employer. See United States v Morton, 467 U.S. 822, 832 & n.15 (1984). A garnishment proceeding to enforce a judgment debt is an ancillary legal proceeding against the third party garnishee and must be brought where jurisdiction can be obtained over the third party. Harris v Balk, 198 U.S. at 222. No legal proceeding, including garnishment, may be brought against the United States absent a waiver of its sovereign immunity. See United States v Mitchell, 445 US 535, 538 (1980). Thus,

prior to enactment of 42 USC 659 in 1974, wages payable from the United States to an employee were not available for garnishment or similar legal process. See, e.g., Bolling v Howland, 398 F.Supp. 1313 (M.D.Tenn.1975). In 1974, Congress gave consent to proceedings in the nature of garnishment against the United States but only for enforcement of court-ordered child support and alimony. Specifically, the statute provides:

> §§659. Enforcement of individual's legal obligations to provide child support or make alimony payments.
> (a) United States and district of Columbia to be subject to legal process
> Notwithstanding any other provision of law ... moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the district of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall

> be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

California, in addition to providing for regular garnishment proceedings, has enacted a special procedure, termed a wage assignment, whereby the recipient of court-ordered child or spousal support may obtain a partial assignment of the delinquent party's wages including future wages.[2] Specific procedures are delineated

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[2] Reference is made throughout to Cal. Civ. Code §§ 4701 and 4801.6 (Deering 1984), effective July 1, 1983, which apply in this case. The type of relief authorized therein, a wage assignment, is much more effective than a writ of garnishment which must be directed to a particular employer for past due wages. The procedure has proved so effective it has been adopted by Congress as a mandatory procedure in the Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (amending 42 U.S.C. § 666). See discussion in In re Marriage of Wilson, 209 Cal. App. 3d 720, 257 Cal. Rptr. 477 (1989).

in the California statutes to obtain this type of relief. After receiving a child or spousal support award pursuant to California divorce proceedings, the party entitled to such payments may file a petition against the allegedly delinquent party to obtain an order that that party is in default in the court-ordered payments and in contempt of the court's prior judgment. Once a party obtains an arrearage order, that party may obtain, in an ex parte proceeding, another order from that court wherein the court assigns wages of the judgment debtor to the judgment creditor. Cal.Civ. Code § 4701(b) (Deering 1984). The court has no discretion to do otherwise. See, Lang v Superior Court, 153 Cal. App. 3d 510, 200 Cal. Rptr. 526 (1984) (mandamus action). The wage assignment order need not be served

immediately on anyone. It becomes effective ten days from the date service is made on any employer of the named judgment debtor. Cal. Civ. Code § 4701 (b) (4). Thereafter, the employer "shall continue to withhold" a stated amount from wages or salary due the employee and pay that amount to the named party who obtained the wage assignment. Cal.Civ Code § 4701(b)(7). No specific employer is named in a California wage assignment.[3] Such assignment is binding on all current and future employers who are served with a copy. Cal. Civ. Code § 4701 (a) (1). Moreover, the term "employer" is specifically defined in the California statute to include the United States.

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[3] The Judicial council of California purposefully adopted a generic employer form of assignment for use in this type of garnishment. See In re Marriage of Everett, 220 Cal. App. 3d 846, 169 Cal. Rptr. 917 (1990).

Cal.Civ Code § 4701(g).

The record discloses that Donalinda Ace Millard, appellant's former spouse, obtained an order of arrearage from the Superior Court in San Francisco, California on December 9, 1983, that found appellant to be in arrears in payment of both child and spousal support as of August 31, 1983. Appellant did not appear in that proceeding, although he was personally served in Georgia on October 11, 1983, and provided with an opportunity for a hearing. Appellant does not contest the fact that the arrearage award was obtained in accordance with California law. Donalinda later obtained an order from that same court assigning appellant's salary or wages. This California wage assignment was served on the appropriate pay officer of the United States Army

Finance Center in Indianapolis, Indiana, on September 14, 1984. The standard wage assignment form was completed with the required statements that Arthur F. Millard was required to pay $300.00 a month in child and spousal support and was found, as of August 31, 1984, in arrears in the amount of $14,414.30. The court ordered the salary or wages of Arthur F. Millard assigned and payable to petitioner, Donalinda, in the amount of $300.00 per month until further order of the court plus $700.00 per month for 21 months commencing September 15, 1984, to satisfy the arrearage.[4]

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[4] The Millards were apparently divorced in California and the subsequent orders of the court flow from that divorce proceeding Colonel Millard does not here contest the validity of the divorce and has remarried. Although the Claims court gave Colonel Millard the opportunity to put in evidence, by telephone or in person, particularly on where the divorce occurred, Colonel Millard refused to do so

The Army complied with the wage assignment by making deductions from Millard's monthly paycheck beginning with his check of October 1, 1984. Millard was at the time stationed in Georgia. Millard first attacked the deductions before the Army Board for Correction of Military Records and, then, before the Comptroller General. When these efforts were unsuccessful, he filed suit in the U.S. Claims Court. At no time has he undertaken to defend or challenge the orders of arrearage or wage assignment in the California court. He maintains that he was not obligated to do so although repeatedly advised by the Army that it was his obligation to proceed in California to

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[4] (Continued)
and demanded the court hold hearings in Georgia, where he is currently living. The court did not abuse its discretion in refusing to take the court to Millard.

have the wage assignment set aside. Because Millard raises a plethora of issues dependent on various facts, we will defer a more detailed statement and supplement the facts as we address each issue.[5]

While the underlying theme of Millard's various arguments is that the Army should not have honored any legal process for garnishment except from his present state of residence, Georgia, these arguments are presented as challenges to the legal process from the California court which, per Millard, was not regular on its face. Thus, the government erred, he argues, in complying with the order. He also asserts the government did not comply with certain other sections of the federal statute and regulations respecting

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[5] While Millard appears pro se, he is a lawyer.

garnishment procedures and, therefore, must be held liable to him on this ground.

The government counters (1) that state law discharges the government from liability to Millard for his pay by reason of the government's payment to his ex-wife pursuant to the California wage assignment and (2) that the government's acts, in any event, fall within the scope of section 659(f), a provision added in 1977, which specifies that the United States shall not be liable for any payment made "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section."[6] For reasons which follow, we conclude that while the

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[6] In its entirety, section 659(f) reads:
(f) Nonliability of United States, disbursing officers, and governmental entities with respect to payments

specific exculpatory provision of section 659(f) has not been shown to be invokable on the present record, Millard has advanced no sound legal basis for imposing liability on the United States under state law. Thus, the Claims Court did not err in granting summary judgment in favor of the government.

II

Liability and
Immunity Provisions of Section 659

Two distinct issues are present in a suit against the government as garnishee, brought either by the garnishor or the employee. First, under § 659(a), the

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[6] (Continued)
Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

question must be answered whether the government would be liable to the plaintiff under state law. Second, if state law would impose liability on a private garnishee, the question then is whether the government is not liable because of the exculpatory provision, § 659(f), added to the federal statute in 1977. See Pub.L. No. 95-30, § 501(a), (b), 91 Stat. 157. Even without the latter provision, in effect a reservation of sovereign immunity, the government cannot be held liable in a suit for the wages paid or not paid under the writ in circumstances in which a private employer would not be held liable. If state law exculpates an employer, that ends the challenge against the United States as far as any claim based on garnishment principles. To illustrate resolution of

the first question, in Calhoun v United States, 557 F.2d (4th Cir.)(per curiam), cert. denied, 434 U.S. 966 (1977), which was decided before the immunity provision was enacted, the Fourth Circuit found no liability on the part of the government for complying with a California garnishment writ respecting the wages of an employee who was resident in Virginia at the time the government was served. The Fourth Circuit, applying standard garnishment principles, held that the employee, not the government, was obligated to challenge the order of the California court to stop the garnishment. Once legal process is properly served on the government, the government has to pay in accordance with the order; otherwise it may be liable to the garnishor for the amount ordered to be paid. See, e.g., In

re Matthews, 61 Comp. Gen. 229, 230 (1982); In re Bailey, 56 Comp. Gen. 592, 594 (1977)(United States subject to District of Columbia law making employer liable to judgment creditor for failing to withhold money from an employee's salary.); Cal. Civ. Code § 4701(b(7); Cal. Civ. Proc. Code § 706.154(a).

To a large extent the later enacted immunity provision of section 659(f) parallels the circumstances in which state law would not impose liability on a garnished private employer. See Morton v United States, 708 F.2d 680, 697 (Fed. Cir. 1983)(Nies, J., dissenting), rev'd, 467 U.S. 822 (1984). Under general principles of garnishment, an employer who honors a writ "regular on its face" issued by a court of competent jurisdiction,[7] who

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[7] A "court of competent jurisdiction" is one with subject matter jurisdiction to issue the order; it

is properly served, and who gives notice to the employee so that the employee may timely challenge the garnishment has no further duty to the employee. The employer's payment of wages due the employee in accordance with the order of such court discharges the employer's debt to the employee. See Morton v United States, 708 F.2d at 694 (Nies, J., dissenting); Cal. Civ. Proc. Code § 760.154(b). See also Clyne v Easton, Eldridge & Co., 148 Cal. 287, 83 P. 36 (1905); McDaniel v City & County of San Francisco, 259 Cal. App. 356, 66 Cal. Rptr. 384 (1968).

The immunity provision of section 659(f) incorporates these requirements but

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[7] (Continued)
need not also be shown that such court had in personam jurisdiction over the defendant. United States v Morton, 467 U.S. at 835-36 (citing 5 C.F.R. § 581.305(a) (1984).

is narrower in that the statutory immunity provided therein is also conditioned on the government's compliance with all of the statutory provisions of section 659 and the regulations thereunder. However, the government need not resort to exculpation under section 659(f) if it would not be liable to its employee under state law inasmuch as section 659(a) subjects the United States to liability in connection with garnishment only "in like manner and to the same extent as if the United States were a private person."[8] See Morton, 467 U.S. at 832-33.

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[8] For a more complete explanation of §§ 659(a) and (f) see the dissenting opinion of Nies, J., in Morton v United States, 708 F.2d at 692-697.

III
The California Wage Assignment Was Regular on its Face

United States v Morton, 467 U.S. 822 (1984), is the leading case on interpretation of section 659 and the obligations of the United States upon being served with a writ of garnishment. In Morton, the Supreme Court held that the United States was not liable to an employee for wrongful payment of wages to the employee's former spouse pursuant to a writ of garnishment issued by an Alabama state court, even assuming the Alabama court did not have in personam jurisdiction over the employee in the underlying proceedings. Colonel Morton claimed his residence was in Alaska. The Court held that the United States was bound under section 659 to honor a writ from a court which had subject matter

jurisdiction to issue the writ. If the writ was regular on its face in this respect, the United States could not look behind the writ to determine whether such court also had acquired personal jurisdiction over the employee. It had to obey the writ.

Millard seeks to distinguish his situation from the holding in Morton in that, unlike Colonel Morton, he is attacking the wage assignment order here as not "regular on its face." In support of this attack, he puts forth a confusing array of arguments to which we have attempted to give some structure.

Millard initially appears to argue that because the arrearage order indicates on its face that he was not served in California, that order, which gave rise to the wage assignment, is void, and thus the wage assignment is not "regular on its

face." Contrary to Millard's view, a court may acquire in personam jurisdiction over a nonresident served outside the state. The ubiquitous long-arm statutes negate Millard's legal contention. See, e.g., Cal. Civ. Proc. Code § 410.10 (Deering 1984). A non-resident person not physically present in a state need only have the necessary "minimum contacts" to satisfy due process principles. Kulko v Superior Court, 436 U.S. 84,92,98 (1978). Thus, if the wage assignment and the underlying order of arrearage do establish that Millard was a resident of, and was served in Georgia, that did not serve to alert the government that the California court did not have jurisdiction. As stated by the Supreme Court in Morton, the jurisdiction of the issuing court over the employee simply cannot be determined on the face of the writ. Morton, 467 U.S.

828-29. Thus, a statement in a writ that the defendant is a nonresident of the state and was served outside the state does not negate its facial regularity.

Millard next argues that his pay was not in California and, thus, was not subject to garnishment there. However, the nebulous concepts surrounding the situs of a debt are irrelevant in this case where garnishment is issued to enforce an existing judgment. The court issuing a garnishment order for enforcement of its own judgment need only acquire jurisdiction over the garnishee. See, e.g., Javorek v Superior Court, 17 Cal. 3d 629, 552 P. 2d 728 (1976); Atkinson v Superior Court, 310 P.2d 145, 151 (Cal.App. 1957). The United States is subject to the jurisdiction of the California court for garnishment purposes, as it is throughout the United States, in

view of its waiver of sovereign immunity in section 659(a) and its specification of where such process may be served 5 C.F.R. § 581.201 (a) (1990) (App.A.) Millard's argument that any California judgment had to be domesticated in Georgia to be enforceable against him also misses the mark. The dispositive point here is that the California court could enforce its order in California against the United States.[9]

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[9] Nelson v Nelson, 327 S.E.2d 529 (Ga.App. 1985) is not contrary authority. That case held that a spouse seeking a writ of garnishment was not entitled to such writ under particular state law. Here, the "writ" had been issued.

Further, Millard's assertion that the other provisions in federal and state law respecting reciprocal enforcement by the states of support orders is similarly misplaced. These provisions support judgment in that person's state of residence, because the state cannot obtain jurisdiction over the other party. See 42 U.S.C. § 654 (1988). A California judgment of arrearage was obtained here against Millard.

In connection with this issue, Millard also puts forth numerous due process arguments based on his interpretation of prejudgment attachment safeguards which he seeks to apply to post-judgment enforcement of a money judgment. It suffices to say concerning these due process arguments that the presence of Millard's wages in California was not the jurisdictional basis for the underlying arrearage order. Only after the arrearage order was obtained, thereby creating a judgment debt, was enforcement of that debt sought against his employer. Thus, Millard's citation to Sniadach v Family Finance Corp., 395 U.S. 337 (1967), and similar authority which restricts acquisition of jurisdiction over a nonresident by means of prejudgment attachment of his property is inapposite.

The wage assignment here was not used for that purpose. A money judgment had previously been obtained against Millard by his wife. If we assume the California court did not have jurisdiction to issue a money judgment against him, as the Supreme Court assumed was the case in Morton, the United States nevertheless had to obey the enforcement order (wage assignment), and such compliance gives rise to no claim by Millard against the United States. His due process rights in having a money judgment entered against him, if violated, would have been violated by the California court that issued the order, not the United States which merely complied with that order as it was required to do. Moreover, it is undisputable that the California court provide full opportunity for Millard to challenge the arrearage

judgment and would, in addition have entertained a motion to quash the wage assignment. Millard simply failed to avail himself of his rights.

Millard appears to believe that merely by saying that he is attacking the regularity of the legal process on its face, the way is thereby open for Millard to proceed with a substantive collateral attack on the California process for reasons concerning its asserted jurisdiction over him. Contrary to Millard's view, the Claims court did not find that the California court had jurisdiction over him. That was unnecessary. The Claims court held that such arguments are precluded under Morton. We agree. The legal process from the California court was regular on its face

and no further inquiry was necessary by the United States.

Finally, Millard looks to other federal statutes, for example, the Soldiers and Sailors Civil Relief Statute of 1940, 50 U.S.C. § 501 et seq., and maintains that this act was violated. Millard's difficulty is that he attempts to assert the same rights in litigation against his garnisheed employer as he would have in the litigation against his wife. An employer is merely a stakeholder who must obey the order of a court properly served on it. See, e.g. Cal. Civ. Proc. Code § 706.154 (b); Atkinson v Superior Court, 310 P.2d 145 (Cal. Ct. App. 1957) (mandamus action). The employer's duty to its employee is to inform the employee of what has happened so that he can himself timely challenge

the court's action garnishing his wages. See, Cal. Civ. Proc. Code § 4701 (b)(5). As stated in Harris v Balk, 198 US at 227:

> Thus [i]t is recognized as the duty of the garnishee to give notice to his [employee], ... so that the [employee] may have the opportunity to defend himself against the claim of the person suing out the attachment.... This notification by the garnishee is for the purpose of making sure that his [employee] shall have an opportunity to defend the claim made against the attachment suit. Fair dealing requires this at the hands of the garnishee.

See also, Morton, 708 F.2d at 695 (Nies, J., dissenting).

There is an issue of late notice by the government in this case which we will address shortly. All that is necessary here is to state that compliance with all federal statutes concerning the rights of servicemen does not have to appear on the face of the legal process served on the government to make such process regular on its face.

IV

Procedural Objections

A. Noncompliance with 5 C.F.R. § 581.202(a)

Millard asserts that the Army violated 5 C.F.R. § 581.202 (a) (1990) which provides that a garnishor must serve on the United States legal process "which names the governmental entity as garnishee." As indicated, the type of legal process used in this case is a blanket wage assignment which in its regular form is directed generically to any "employer" of the judgment-debtor. Further, the statutory definition of "employer" in the California statute includes the United States specifically. See Cal. Civ. Proc. Code § 4701 (g).

The Army interprets its regulation requiring identification of a "governmental entity" to be satisfied by the generic designation of "employer" which appears in a California wage

assignment. In other words, "employer" in the order is construed to identity the government. Millard argues that the legal process must state a specific governmental entity in the body of the wage assignment to comply with the regulation. Nothing in the federal statute imposes this restriction on legal process which the government must accept. In effect, Millard's interpretation would rule out this type of legal process as a means of garnishment against military wages.

We conclude that the government's interpretation of the regulation is reasonable given the broader language of the statute itself. The statute waives immunity broadly for service of "legal process [with respect to] legal obligations to provide child support or make alimony payments." 42 U.S.C. 659(a). The subject California wage assignment for

child and spousal support falls squarely within the waiver provided by section 659(a), and the government's interpretation of the regulation, thus, does not transgress the scope of that statutory waiver. Indeed, the interpretation is not merely reasonable but mandated by the statute. See, e.g., Horton, 467 U.S. at 835-36 (regulations invalid when "clearly inconsistent" with the statute).

Moreover, as the Claims Court indicated, even if the regulation were interpreted to require the Army to be named specifically, the purpose of the regulation is "protection for the Government" and can be waived. In other words, the government might assert, in an appropriate case, as against a garnishor, that such garnishor did not comply with the regulation and, therefore, the

government is not liable for failure to honor a particular order. Indeed, the regulation is structured into the part of regulations directed to service of process by the garnishor. The rights of the employee whose wages are being garnished are set forth in a later part of the regulations, section 581.302, to which we turn now. As far as the requirement to name a government entity, we agree that Millard has no claim based on that regulation.

B. Noncompliance with 42 U.S.C. § 659(d) and 5 C.F.R. § 581.302

Millard further asserts that the Army failed to provide notice of the garnishment within the time period required not only by regulation but also by statute. Section 659 (d) reads:

(d) Notice

> Whenever any person, who is designated by law or regulation to accept service of process to which the United States is subject under this section, is effectively served with any such process or with interrogatories relating to an individual's child support or alimony payment obligations, such person shall respond thereto within thirty days (or within such longer period as may be prescribed by applicable State law) after the date effective service thereof is made, and shall, as soon as possible but not later than fifteen days after the date effective service is so made of any such process, send written notice that such process has been so served (together with a copy thereof) to the individual whose moneys are affected thereby at his duty station or last-known home address.

The regulation, 5 C.F.R. § 581.302, further specifies the contents of the notice.[10]

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[10] The regulation generally requires that the notice include a copy of the legal process, the maximum garnished limitations as set forth in § 581.402, requests for submissions by the obligor of documentation necessary to make calculations, explanation that obligor's sending affidavits constitutes consent to their disclosure, and the percentage of wages to be garnished if obligor fails

The Army submitted a copy of the required notice which it believes was timely, but it was not able to verify at the time of the summary judgment motion the exact date such notice was given to Millard. For purposes of summary judgment, the government, therefore, does not contest Millard's statement that he did not receive the notice of garnishment within the statutory 15-day period.

The trial court held that Millard had to demonstrate that the lack of notice foreclosed his right to overturn the wage assignment and concluded that, since Millard never sought any relief in the California court, such prejudice could not be shown. Millard, 16 Cl. Ct. at 490-91.

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[10] (Continued)
to submit any needed documentation. 5 C.F.R. § 581.302(a). The notice may include additional information explaining the obligor's rights and available protection, and that the United States does not represent the interests of the obligor in the proceedings. 5 C.F.R. § 581.302(b).

We agree with this analysis with respect to the absence of liability under state law and add only the following additional points.

First, the lack of notice affects, at most, the deduction from Millard's October 1, 1984 paycheck. Millard acknowledges the receipt of a proper notice from the government in early October. Id. at 487. Millard's theory that if he was not given notice within the first 15 days, all payments made after that time are wrongful is untenable. Statutory time periods have varying significance. In some statutes, time limits are merely precatory. See, e.g., Tuft v McDonnell Douglas Corp., 517 f.2d 1301, 1306-07 & n.10 (8th Cir. 1976), cert. denied, 423 U.S. 1052 (1976) (EEOC failure to complete investigation within statutorily prescribed time for bringing

suit does not bar suit by employee); Cunningham v Litton Indus., 413 F.2d 887, 890 (9th Cir. 1969) (same); Miller v International Paper Co., 408 F.2d 283, 287 & n.17 (5th Cir. 1969) (same); Choate v Caterpillar Tractor Co., 402 F.2d 357, 361 (7th Cir. 1968) (same). In others, they are absolutely critical. United States v Kubrick, 444 U.S. 111 (1979) (Federal Tort Claims Act suit barred if not brought within two years of time when cause of action accrues); United States v Mottaz, 476 U.S. 834, 851 (1986); Kabua v United States, 546 F.2d 381, 383, 212 Ct. Cl. 160, 164 (1976), cert. denied, 434 U.S. 821 (1977). Here, we conclude that the trial court correctly analyzed the significance of the violation in terms of prejudice. No doubt the statutory and regulatory provisions are for the

protection of the employee. However, to hold that a nonprejudicial delay would require the government to pay double wages forever after is contrary to state law principles of garnishment.

The federal statute generally parallels the requirement in the California Code that the garnishee / employer must give prompt notice to the employee of the wage assignment although California provides even less time. California law gives ten days for the wage assignment to become effective during which time period the employer is directed to give notice to its employee of the assignment. Cal. Civ. Proc. Code § 4701 (b)(5). The California statute further provides that the employee has ten days from the date of such notice from the employer in which to move to quash the

wage assignment. Cal. Civ. Proc. Code § 4701(b)(6). Thus the delay in receiving notice does not prejudice the employee with respect to his time period for contesting the wage assignment. However, only limited defenses are available to that order[11] and failure to contest the wage assignment within the time period allowed for a motion to quash ends that possibility.

In this case, Millard had until the end of October, 1984 to challenge the wage assignment order in the California court from which it originated, and he failed to

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[11] See Cal. Code Civ Proc. 4701(b)(6); In re Marriage of McLucas, 210 Cal. App. 3d 83, 258 Cal. Rptr. 133, (1989); Solberg v Wenker, 163 Cal. App. 3d 475, 209 Cal. Rptr. 545 (1985); Le Claire v Le Claire, 118 Cal. App. 3d 719, 173 Cal. Rptr. 740 (1981) (section 4701(b)(6) contains grounds on which to quash an assignment order issued). For example, payment of the arrearage after the judgment is a defense.

do so. In the Claims Court, he proffered no evidence, in any event, of a viable defense to the wage assignment under California law. The government's delay in giving notice was clearly not prejudicial with respect to deductions beginning November 1, which he could have contested in advance of their being made. Thus, only the first deduction is possibly in question. However, from the structure of the statute we conclude that California law does not impose liability on an employer for failure to give notice in advance of the first deduction.

Under the California statute, the time periods do not work out to guarantee advance notice of deductions. A wage assignment is effective upon the expiration of ten days and the employer is required thereafter to pay the assignee.

Cal. Civ. Proc. Code § 4701(b)(4)(7). The tenth day is also the day by which notice must be given to the employee. Cal. Civ. Proc. Code § 4701(b)(5). The wage assignment and the notice provision, thus have the same effective date with no time allowed for a prior hearing on a motion to quash. Moreover, the statute specifically requires payment by the employer to the garnishor while any motion to quash is pending and such payments must continue until the employer is served with notice that the motion to quash has been granted. Cal. Civ. Proc. Code § 4701(b)(4)(7).

Thus, we conclude that due to the government's delay in notice, the first deduction was not precluded from challenge in court under § 459(f) and no prejudice has been shown from untimely notice with respect to any of the deductions. The

United States gave notice which afforded Millard ample "opportunity to defend"[12] the garnishment in the California court because the time did not begin to run until such notice was given.

Millard, thus, was not prejudiced by the government's alleged delay [13] and the United States would, therefore, like any other employer, not be liable to its employee under state law.

V

Summation

To a large extent Millard's arguments for imposition of liability on the government are based on rights he discerns

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[12] Harris v Balk, 198 U.S. at 227.

[13] Violation of the regulation in itself, of course, does not create a money mandating claim. See, e.g. Army & Air Force Exch. Serv. v Sheehan, 456 U.S. 728, 736-41 (1982); United States v Mitchell, 445 U.S. 535 (1980); United States v Testan, 424 U.S. 392 (1976); Millard, 16 Cl. Ct. at 491.

in section 659(f), the provision added in 1977 which, as previously indicated, expressly negates the liability of the United States under certain conditions. this provision of the statute does not impose liability on the government in any circumstances. Rather it preempts the imposition of liability under state law and preserves sovereign immunity if the government meets the conditions set forth therein. The Supreme Court in Norton, 467 U.S. at 831 n. 12, expressly gave this interpretation of the statute, stating:

> The 1977 amendment of the statute, adding § 659(f), ... specifies only those circumstances in which the Government is not liable. [Emphasis added.]

Assuming the government did not meet the express exemption, Millard can only

recover if, under California law, a private employer would be held liable to Millard for wrongful garnishment had it acted the same as the government acted here. Millard appears to have lost sight of the basic provision -- section 659(a) -- which makes moneys payable by the United States as employer "subject in like manner and to the same extent as of the United States were a private person." The government prevails if it falls within the express exemption or if it would not be liable under state law.

By failing to provide notice within 15 days, the government does not meet the literal requirement of section 659(f) for assertion of the immunity there reserved. Whether section 659(f) should be analyzed in terms of harmless error, we need not decide. To counter the government's assertion of no liability under state law,

Millard had to come forward with evidence or sound legal principles which at least would raise a question that California might impose liability on a private employer to its employee in this case. He failed to do so. Thus, the award of summary judgment in favor of the government was correct.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
89-1461

ARTHUR FRANK MILLARD,
Plaintiff-Appellant,
v
THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES CLAIMS COURT in CASE NO(S). 307-88C

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

Dated: OCT 01, 1990

/S/_____
Francis X. Gindhart
Clerk

COSTS: Against, Appellant.
PRINTING--------$245.84
TOTAL-----------$245.84
ISSUED AS A MANDATE: November 20, 1990

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

89-1461

ARTHUR FRANK MILLARD,

Plaintiff-Appellant,

v

THE UNITED STATES,

Defendant-Appellee.

O R D E R

Before NIES, Chief Judge, BENNETT Senior Circuit Judge, and Archer, Circuit Judge. A petition for rehearing having been filed in this case, UPON RECONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration. The mandate will issue on November 20, 1990.

FOR THE COURT,

Dated: November 13, 1990

cc: Arthur F. Millard
John S. Groat

Francis X. Gindhart
Clerk

Filed
U.S. Court of Appeals For
the Federal Circuit
Nov 13 1990
Francis X. Gindhart, Clerk

Note: this order has not been prepared for publication in a reporter.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
89-1461

ARTHUR FRANK MILLARD,
Plaintiff-Appellant,
v
THE UNITED STATES,
Defendant-Appellee.

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON RECONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

Dated: November 26, 1990

Francis X. Gindhart
Clerk

cc: Arthur F. Millard
John S. Groat

Filed
U.S. Court of Appeals For
the Federal Circuit
Nov 26 1990
Francis X. Gindhart
Clerk

Note: this order has not been prepared for publication in a reporter.

IN THE UNITED STATES CLAIMS COURT
No. 307-88 C
Filed: March 13, 1989

Arthur Frank Millard,	)	Military pay--42 USC §659,
	)	United States as Garnishee
Plaintiff,	)	Enforcement of garnishment
	)	order regular on its face
	)	not invalidated by obligor's
v.	)	lack of opportunity for
	)	collateral attack. Procedural
	)	irregularities in im-
The United States	)	plementation of garnish-
	)	ment order actionable only
Defendant.	)	upon obligor's proof of
		actual monetary injury.

Arthur Frank Millard, Pro Se.

John S. Groat, with whom were Assistant Attorney General John R. Bolton, Director David M. Cohen, and Assistant Director M. Susan Burnett, for defendant. Major Robert McFetridge, Department of the Army, and Berenith A. Velez-Torres, Esq., USAFAC, of counsel.

OPINION

WIESE, Judge.

The plaintiff in this case is a retired member of the United States Army whose military pay, commencing in september of 1984 (when he was still on active duty), became subject to a

California wage assignment order (a garnishment order) for child and spousal support. In accordance with this order, the Army has been paying part of his monthly salary (now his retirement annuity) to his former spouse. This suit was brought to recover the monies thus withheld, the contention being that the Army's actions are in violation of the governing statute, 42 USC 659 (1982) and its implementing regulations. 5 CFR 582.101 et seq. (1988). The issue is before the court on cross-motions for summary judgment. Upon consideration of the parties; briefs and without oral argument, [1] we hold for the Government.

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[1] It is this court's practice to hear argument on every substantive motion and to allow out-of-town litigants to appear for such arguments by telephone, i.e., through a reporter-recorded conference call. In this case, however, plaintiff declined to

FACTS

The events which give rise to this lawsuit began on October 1, 1984 when plaintiff, then a lieutenant colonel stationed at Fort Gordon, Georgia, received a copy of his monthly pay statement showing a deduction of $760.77 from his basic pay for the month of September. No explanation accompanied this deduction other than the listing of his ex-wife's name.

Plaintiff made inquiry and was advised by the Army Finance Center in Indianapolis, Indiana, that the deduction

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[1] (Continued)
participate by telephone. He insisted instead that argument be heard in Atlanta, Georgia (a location near to his home) so that he could appear in person. his motion to this effect was denied; hence, no argument was heard. We add that, while plaintiff is a pro se litigant, he is also a lawyer.

was in compliance with a California court order. The Army further advised him that any disagreement he had, either with the lawfulness of the deduction or its amount, would have to be taken up with the California court. Several days later (the facts do not give a precise date) the Army Finance Center sent plaintiff a copy of the order in question.

This order, which is dated August 31, 1984, is an order issued by the Superior court of California, County of San francisco, titled "Order Assigning Salary Or Wages.: The order contains the following information. First, it recites that "Respondent, Arthur F. Millard" (plaintiff herein) had previously been ordered to pay $300 per month in child and spousal support and that, as of the date of hearing (August 31, 1984), he was in

arrears in these payments to the extent of $14,414.30. Second, the order directs that the salary or wages of Arthur F. Millard be assigned and made payable to "Petitioner, Donalinda Ace Millard" (plaintiff's former spouse). Third, it orders "the employer" to deduct $300 per month from respondent's wages "until further order of court" and, commencing September 15, 1984, "$700 per month for a period of: 21 months" to make up the arrearage. The order was served on the United States Army in Indianapolis, Indiana on September 4, 1984; it remains in effect to this day notwithstanding plaintiff's retirement from the military on June 30, 1986.

From the beginning, plaintiff has protested the garnishment of his wages claiming that the California order was

unwarranted in law and without justification in fact. His efforts to undo the order have been numerous and include a lengthy application for relief that was filed with the Army Board for Correction of Military Records on June 9, 1986. In a letter dated June 30, 1987 that board advised him that the Army was required by 42 USC 659 to honor the wage assignment. The correction board's letter reads, in part, as follows:

> As garnishee, the Department of the Army does not have authority to remove from its own records a writ of garnishment that is regular on its face. Consequently, if you wish to attack the writ with constitutional or other arguments, you will have to do so in the Superior Court of California.

Plaintiff did not follow this advice. Instead, he has chosen to continue a collateral attack upon the garnishment order by seeking its invalidation in this court.

DISCUSSION

Title 42 of the United States Code, section 659 (1982), removes the barrier of sovereign immunity to state-authorized garnishment proceedings whose purpose is the enforcement of legal obligations for child support or alimony payments. [2] Implementation of the statute involves (i) service upon the United States of legal process (meaning a writ of garnishment or similar process issued by a "court of competent jurisdiction," 42 USC §659(b),

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[2] Section 659(a) provides as follows:

Notwithstanding any other provision of law ... moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States ... to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States ...were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

§662(e), (ii) notice to the obligor, by the United States, of the receipt of such process, within "fifteen days after the date effective service is ... made," 42 USC §659(d), and (iii) compliance with such process where it is "regular on its face," 42 USC §659(f).

The statute specifies that the United States shall not be liable for any payments made "pursuant to legal process regular on its face, if such payment is made pursuant to regulations issued to carry out this section." 42 USC 659(f). It is out of this section that plaintiff draws his arguments. He presents essentially two contentions. The first is that the legal process which the United States honored was not regular on its face; the second is that the procedures adhered to in complying with that process

were not in conformance with regulation and statute. In considering these arguments, the specifics of which we come to in a moment, we refer first to the decision in United States v Morton, 467 U.S. 822 (984), a case whose issues parallel, in part, our own.

Like the present case, the controversy in Morton involved a military service member who sued for the recovery of monies being withheld from his pay under the authority of an out-of-state garnishment order for alimony and child support. The question in the case was whether Section 659's requirement for the issuance of legal process by a "court of competent jurisdiction: contemplated an order issued by a court having personal jurisdiction over the support obligor. The answer was "no."

The rationale for this result was that the breadth of inquiry necessary to validate an exercise of *in personam* jurisdiction over a non-resident defendant was fundamentally at odds with the requirement for a process "regular on its face." The jurisdictional inquiry, the court pointed out, examines the question whether it is reasonable to expect a defendant to defend his interests in a distant and perhaps inconvenient forum, and thus requires " evaluating a specific aggregation of facts, as well as the possible vagaries of the law of the forum." *Id.* at 829. By contrast, ascertaining whether process is "regular on its face," demands no inquiry beyond the face of the document. As the Court explained (and here it quoted with approval from the comptroller General's

decision in In re Matthews, 61 Comp. Gen. 229, 230-31 (1982)):

> "The inquiry into whether an order is valid on its face is an examination of the procedural aspects of the legal process involved, not the substantive issues. Whether a process conforms or is regular 'on its face' means just that. Facial validity of a writ need not be determined 'upon the basis of scrutiny by a trained legal mind,' nor is facial validity to be judged in light of facts outside the writ's provisions which the person executing the writ may know." 467 U.S. at 829, n.10.

Thus, the Court concluded that the kind of inquiry which a determination of personal jurisdiction entails was inconsistent with the limited inquiry necessary to establish the facial regularity of an order: "[i]nquiry into the issuing court's jurisdiction over the debtor cannot be squared with the plain language of the statute, which requires

the recipient to act on the basis of the 'face' of the process." Id. at 829. Therefore, it was determined that, as regards the issue of personal jurisdiction, "[n]o such inquiry could have been intended." Id. at 831 (Footnote omitted). The Morton decision is dispositive of much of plaintiff's case.

Among the contentions which plaintiff raises is the argument that the order directed to the United States from the Superior Court of California -- the Order Assigning Salary Or Wages -- was not regular on its face and, thus, was void. None of the reasons he offers in support of this position has merit.

As the decision in Morton makes clear, the phrase "regular on its face," means nothing more than what it says: legal process whose validity, facially

judged, appears to evidence a legitimate exercise of jurisdiction on the part of the issuing authority. Assessed against this standard then, the question is not whether there are infirmities underlying the garnishment order, as plaintiff attempts to show; [3] rather, the question is whether the order shows anything on its face that provides reasonable notice that it was issued without authority of law.

Quite clearly the answer is that it does not. the order is complete in all its details -- it recites the names of the

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[3] Plaintiff's arguments against the facial regularity of the order include, inter alia, the contentions that the order (i) fails to comply with California law regarding personal service, (ii) fails to comply with California law governing issuance of default judgments, (iii) fails to show compliance with federal laws governing default judgments against persons in military service, and (iv) is not a final order. These purported deficiencies are precisely the sort of defects which a facially-directed inquiry was meant to exclude.

parties, the basis for the action being taken, and the amounts to be withheld. further, it bears the seal of the court under whose authority it was issued, the stamped signature of the judge that ordered the action and, finally, an attestation by the clerk of the court that the instrument represents a correct copy of the original on file in the clerk's office. In short, the order is regular on its face.

Plaintiff insists, however, that in order to pass constitutional muster, a garnishment directive must be substantiated by more than just surface markers of procedural regularity. Specifically, it is his contention that the Fifth Amendment's assurance against deprivations of property without due process of law entitles him to an

opportunity to contest in Georgia (the state of his residency) the jurisdictional validity of the California order. Since such an opportunity was not afforded him, he contends that the California order amounts to nothing more than a constitutionally prohibited exercise of extra-territorial jurisdiction.

The immediate answer to this argument is that it is implicitly rejected by the decision in Morton: that case affirmed the enforceability of a garnishment order regular on its face notwithstanding an express assumption of lack of personal jurisdiction on the part of the out-of-state court that issued. 467 U.S. at 827. given this holding, an argument voicing opposition to a garnishment order for lack of opportunity to collaterally attack the order logically cannot survive.

But, going beyond Horton to more fundamental ground, the answer to plaintiff's argument is that it rests on a mistaken understanding of the law. There can be no question that due process of law demands notice and an opportunity to be heard before a person may be deprived of his property. This does not mean, however, that a defendant is always free to raise the issue of a personal jurisdiction through a collateral attack in a forum most convenient to him. Rather, that procedural benefit is a matter of happenstance; it occurs only where enforcement of an out-of-state judgment is being sought in the defendant debtor's own state. In other words, the situs of the litigation -- the point where a defendant may be compelled to contest the assertion of a foreign court's

jurisdiction over him -- is simply a function of where his assets are reachable.[4] Thus, in the case of a multi-state garnishee (meaning a garnishee having a business presence in several states), a challenge to the jurisdictional underpinnings of the garnishment proceeding may well proceed in a state other than the one in which the wages have been earned. See e.g., Champion International v Ayars, 587 F. Supp. 1274, 1276 (D.Conn. 1984); Calhoun v United States, 557 F.2d 401 (4th Cir.), cert. denied, 434 U.S. 966 (1977). the short of the matter, therefore, is that if plaintiff wished to contest the

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[4] Concerning so-called "attachment jurisdiction," the Restatement (Second) of Judgments, § 8 (1982), explains that a "court may exercise jurisdiction to seize property whose situs is in the state, by attachment, sequestration, or similar procedure, in an action concerning a claim against the owner of the property if ... (b) [t]he action is to enforce a judgment against the owner of the property."

California court's assertion of personal jurisdiction over him, he was bound to go to California to do so. And since there is no contention made here that California would not have provided him with a full and fair opportunity to be heard on his jurisdictional contentions, there can be no offense to due process in requiring that he present his arguments there. [5]

Moving to plaintiff's arguments about violations of regulation, the first issue we encounter has to do with the requirement in 5 CFR 581.202(a) (1988) that a garnishor must serve on the United States legal process "which names the

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[5] To be more specific, plaintiff does not argue that California hearing was unavailable or inadequate or that he could not have entered a limited appearance in California for purposes of challenging the court's assertion of jurisdiction over him.

governmental entity as garnishee."[6] Since the wage assignment order in question did not specifically name a governmental entity -- it was directed simply to "employer" --the argument is made that the garnishment was unauthorized, i.e., an impermissible enlargement of the waiver of sovereign immunity. The position is without merit.

Only Congress has the constitutional authority to waive the Government's immunity to suit, United States v N.Y. Rayon Importing Co., 329 U.S. 654, 658-660 (1947), Minnesota v United States, 305 U.S. 382, 388 (1939); hence, only Congress

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[6] The section referred to, 5 CFR §581.202(a), reads in its entirety as follows:

A party using this part shall serve on the designated agent of the governmental entity which has moneys due and payable to the obligor, legal process which names the governmental entity as the garnishee.

may specify the conditions under which that waiver shall be permitted to operate. Waiver of immunity and the conditions attendant thereto are expressions of the same authority. Regulations, by contrast, are simply the administrative ground rules for the operation of the statute and, as such, are intended as much for the protection of the Government as for the guidance of the public. regulations can neither enlarge nor diminish the scope of the waiver of immunity. Id. The requirement that a garnishment order name the governmental entity to which it is directed is a requirement found not in the statute, but in its implementing regulations. Consequently, where the Government decides to honor a writ that only names a garnishee in general terms and not a governmental entity in

particular, the action is a transgression of regulation and not an unauthorized enlargement of the basic statute.

This is not to say, however, that the Government may not be held accountable for the infraction. Clearly, if because of a departure from regulation, funds in the Government's hands are mistakenly paid over to a garnishor not otherwise entitled to them, then the Government shall have to remedy its error by restoring the misdirected funds to the rightful owner. See Eastport Steamship Corp. v United States, 178 Ct.Cl. 599, 605, 372 F.2d. 1002, 1007-8 (1967). In other words, the violation of regulation is monetarily redressable to the extent of any loss actually suffered on account of it. Here, however, we have no occasion to consider this last point since proof of actual

damages would require plaintiff to establish that the garnishment was unlawful from the start.

The last point we take up concern's plaintiff's contention that the Army failed to accord him the benefit of the 15-day notice provision specified in Section 659(d). That section provides, inter alia, that the United States "shall, as soon as possible but not later than fifteen days [after effective service of process] send written notice that such process has been ... served (together with a copy thereof) ..." Plaintiff's complaint is that he was never timely alerted to the fact that the Government had been served with a garnishment order nor was he made aware of the basis for the withholdings from his pay until after they had begun. These actions, he says, violated his rights.

If these contentions are true -- and for purposes of testing the Government's motion for summary judgment we assume they are -- then there can be no question that the Army was in breach of the statute. however, this, of itself, occasions no right to monetary relief. Rather, to base a cause of action on the Army's maladministration, plaintiff must demonstrate an out-of-pocket loss because of it. In other words, plaintiff must show that the lack of notice foreclosed his right to overturn the garnishment order, either initially or after it became effective. However, since he never sought any relief in California -- this despite constant advice to that effect -- he is hardly in a position now to allege that lack of notice deprived him of an opportunity to undo the wage assignment. his complaint about lack of notice is without merit.[7]

CONCLUSION

In the dissenting opinion in Morton v United States, 708 F.2d 680 (Fed. Cir. 1983), the point is made that, under Section 659, "[n]o more is required than that whatever process is served on the Government, the papers must be facially regular and be issued by a court with garnishment jurisdiction." Id. at 703. These views are now the law, United States v Morton, 467 U.S. 822, 836 (1984) and, given the facts of this case, they dictate a decision in the Government's favor.

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[7] In addition to the arguments considered in the opinion text, plaintiff's brief presents numerous additional arguments respecting the alleged invalidity of the garnishment order and the procedures followed by the Government in the implementation of that order. Regarding these

Accordingly, the Government's motion for summary judgment is granted. The complaint shall be dismissed.

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7 (Continued)

arguments, it shall suffice to say that we have considered all but find them too lacking in substance to warrant discussion.

IN THE UNITED STATES CLAIMS COURT

NOTICE

Filed: March 13, 1989

Arthur Frank Millard No. 307-88 C

vs.

The United States

Clerk's Office

Washington, D.C., March 28, 1989

To Attorney of Record, Assistant Attorney General, and Judge Wiese:

Please take notice that in the above case there has been entered this day on the plaintiff's motion, filed March 27, 1989, to alter or amend judgment the following order by the Judge:

DENIED

/s/
Frank T. Peartree, Clerk

FORDEN ATHEARN, ESQ.
Attorney at Law
22 Battery Street, Suite 1100
(415) 956-5700
Attorney for Petitioner

ENDORSED
FILED
DEC 12 1983
DONALD M. DICKINSON, Clerk
BY: Martin P. Anabu
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

In re the Marriage of Millard	)	No.741237
Petitioner:	)	
DONALINDA ACE MILLARD	)	ORDER ESTABLISHING
v	)	CHILD SUPPORT AND
Respondent:	)	SPOUSAL SUPPORT
ARTHUR F. MILLARD	)	ARREARAGES

PETITIONER, DONALINDA ACE MILLARD, having filed an Order to Show Cause and Declaration for Contempt, and respondent, ARTHUR F. MILLARD, having been served with said Order to Show Cause re Contempt and petitioner's Income & Expense Declaration and a blank Income & Expense Declaration on October 11, 1983 at 6:07 p.m. at 3420 Heather Drive, Augusta, Georgia, and said

Proof of Service having been filed on October 28, 1983, and the matter having been continued from time to time, and coming on for hearing on December 2, 1983 before the Honorable Isabella H. grant, and petitioner appearing in person and by and through her attorney, Forden Athearn, and Arthur F. Millard not appearing,

IT IS HEREBY ORDERED AS FOLLOWS:

1. As of August 31, 1983 respondent, Arthur F. Millard is in arrears in spousal support payable to petitioner in the amount of $7,564.36, which entire sum is presently owing, due, and payable by respondent to petitioner.

2. As of August 31, 1983 respondent is in arrears in child support payable to petitioner in the amount of $3,635.00,

plus the sum of $725.00 pursuant to a court order, for a total sum due and payable to petitioner by respondent as and for child support of $4,350.00, which sum is presently owing, due, and payable.

3. The matter of contempt of respondent to the court orders is deferred until such further motion by petitioner.

Dated: December 9, 1983

Isabella H. Grant
Judge of the Superior Court

FORDEN ATHEARN, ESQ.
Attorney at Law
22 Battery Street, Suite 1100
(415) 956-5700
Attorney for Petitioner

ENDORSED
FILED
AUG 31 1984
DONALD M. DICKINSON, Clerk
BY: Martin P. Anabu
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN FRANCISCO

City Hall
San Francisco 94102

Petitioner: DONALINDA ACE MILLARD
Respondent: ARTHUR F. MILLARD
ORDER ASSIGNING SALARY OR WAGES
CASE NUMBER 741237

1. Date of Hearing: Aug 31, 1984 Dept.13

Rm.No.: 403 Judge: Isabella H. Grant

THE COURT FINDS

2. Under prior order of court

a. $300 is payable monthly by (Name):

Respondent, Arthur F. Millard, for

child support

b. $14,414.30 is in arrears as of

(Date): August 31,1984, in child and

spousal support

THE COURT ORDERS

3. The salary or wages of employee (Name):

Arthur F. Millard

is assignec and is payable as follows:

To: Petitioner, Donalinda Ace Millard

4. Upon service of a copy of this order

a. The employer shall deduct and pay from the wages or salary due employee the sum of $300 per month, not to exceed 33 1/3 percent of employee's salary or wages per month, until further order of court.

b. In addition, the employer shall deduct and pay from the wages or salary due employee arrearage in the sum of: $14,414 at the rate of $700 per month for a period of 21 months, commencing (Date) September 15, 1984

5. a. The payments set forth in Item 4a shall be paid to (Name, address, and telephone no.): Petitioner, Donalinda Ace Millard c/o Forden Athearn, Esq. 22 Battery Street, San Francisco 94111 (415) 956-5700

b. The payments set forth in Item 4b shall be paid to

Same as set forth in Item 5a.

Dated: August 31, 1984

Isabellla H. Grant
Judge of the Superior Court

Form Adopted by Rule 1285.70 CC4701
of Judicial Council of California
Revised effective January 1, 1976

ORDER ASSIGNING SALARY OR WAGES

California Newspaper Service Bureau, Inc.

STATE OF GEORGIA)
)
COUNTY OF FULTON)

A F F I D A V I T

Personally before me, the undersigned Notary Public who is duly authorized and empowered by and under the laws of the State of Georgia to administer oaths and to take acknowledgments, appeared one Arthur Frank Millard, who, after being duly sworn upon his oath, deposed and said:

1. I am Arthur Frank Millard, Plaintiff in the case of Arthur Frank Millard, v The United States, now pending in the U.S. Claims Court as case number 307-88C.

2. This affidavit is based upon my personal knowledge of the facts stated

herein, to which facts I am competent to testify. It is given as evidence in support of my Motion for Summary Judgment against the Defendant in the aforesaid case and in opposition to its alternative motions to dismiss or for summary judgment.

3. The facts of this case are correctly stated in the Complaint filed previously in this action. Further relevant facts follow.

4. I served on active duty as a commissioned officer in the U.S. armed forces from 1966 to 1986. From July 1983 to June 1986, I was stationed at Fort Gordon, Georgia, residing at nearby Augusta, Georgia with my wife and two sons, the second of whom was born on the Fort during this time period. I had also

been providing support for a daughter by a prior marriage.

5. The event which launched this pay suit began on Monday morning October 1, 1984 at Fort Gordon, when I received a copy of my monthly Army pay statement. This pay statement showed a taking of $760.77 from my military basic pay for the previous month, September. The statement did not explain the basis for the taking of this $760.77, although bearing the name of my ex-wife. The statement was the first notice I had of this taking.

6. By telephone and letter, I immediately protested to the Army Finance Center in Indianapolis, Indiana and requested return of the $760.77. Mr. Walls, a paralegal employee there, told me that the Army wasn't required to give me

advance notice of the taking, because it was done under authority of a California court order which he said was "regular on its face." He added that I'd have to present my defenses in California, and rejected my contentions that I couldn't go there because of the distance, time and expense. Several days later, the Army Finance Center sent me a copy of an "Order Assigning Salary or Wages" as the basis for the taking. The "Order Assigning Salary or Wages" appears to be the same document as the one at page 96a of the appendix to the government's summary judgment motion.

7. The Finance Center further replied that this taking was from my pay from September 1, 1984 and would continue to an indefinite time in the future. The Finance Center also gave P.L.93-647 as

amended by P.L.95-30 as authority for the action. I then wrote a number of letters to the Finance Center protesting the taking as a violation of my rights under law and regulations, including the U.S. Constitution.

8. In essence, my letters pointed out that I had never been indebted to Donalinda Ace Millard, the named garnishor, in any amount; that the "Order Assigning Salary or Wages" was void on its face; that I has no connection with California, other than having been there temporarily in the past in compliance with military orders; that my military and family obligations in Georgia prevented me from defending my rights in a California Court; and that I requested return of all my pay taken previously. I also pointed out that the "Order Assigning Salary or

Wages" was beyond the subject matter jurisdiction of a California court and that I never had notice that a California court might render a money judgment against me.

9. After all my letters to the Army Finance Center had failed to have effect, I wrote similar letters successively to the Army Comptroller, Inspector General and ultimately, the Army Secretary himself. As before, I received no apparent consideration of my protests and no relief, although the letters were true and the Army never disputed their truth. After some of this correspondence, the Finance Center later sent me a copy of a California court order for contempt based on service of process in Georgia entitled "ORDER ESTABLISHING CHILD SUPPORT AND SPOUSAL SUPPORT ARREARAGES". This is the

same document as the one at page 96b of the appendix to the government's summary judgment motion on file in this action. These orders are the sole basis for the Army's decision to take my pay. Although neither order mentions the Army or the United States, the Army assumed that it was bound by them as my employer without ascertaining whether I had other employers also.

10. Despite my protests, for each successive month from October 1984 thereafter through the present time, the Army continued taking my pay in this manner. As the Georgia courts had no jurisdiction to grant relief because of the Army's actions and sovereign immunity, I sought relief from the Army Board for Correction of Military Records (ABCMR) in June 1986. In July 1987 the

ABCMR returned my petition without action saying only that it had no jurisdiction to grant relief as the California writ was regular on its face and that any attack on the writ would have to be done in that court. Although the ABCMR was presented with the original copies of the documents at pages 13 through 96 of the appendix to the government's summary judgment motion on file in this action, it discussed none of the arguments made in rejecting my petition. Apparently it also did not consider my protest letters mentioned above, as they are not in the administrative record filed in this action.

11. The Army's records in July 1983 showed that I was stationed at Fort Gordon, Georgia, and residing at nearby Augusta, Georgia with my dependent family

members. The Army decision to take my pay added to the great economic and geographic obstacles I faced in defending my rights in California or Indiana, and also made further active duty an extreme economic hardship.

12. I therefore applied for placement on its retired list at my earliest opportunity, June 30, 1986, and moved himself, my wife and two sons from our residence in Augusta to Atlanta, Georgia. After retirement, I asked the Army Finance Center to comply with Georgia law which exempts my retired pay from garnishment until in my hands. The request was denied.

13. In October, November and December 1984 the amounts taken from my pay in this manner were $760.77 for each month. From

January through June 1986 the amount taken rose to $786.71 monthly, again with no prior notice to me of the increase. After I left active military duty in July 1986, the takings continued but fell to $527.48 monthly for July, August, September, October and November 1986; in December 1986 through March 1987, the takings rose to $544.64 for each month, again without prior notice; in April and May 1987 the takings were $529.64 for each month; in June through September 1987 the takings were $510.09 for each month; in October and Noveber 1987 the taking was $494.26 for each month. In December 1987 the taking was $326.20; and from January through July 1988, $300.00 monthly.

14. The Army never told me in advance how much it intended to take or how the amounts taken were calculated and refused

to tell me when the takings would stop, insisting that my only recourse was in the California courts. I also had no prior notice that the takings would continue after retirement in any amount and could never anticipate what amounts would be taken from month to month. As of August 1, 1988 the total sum taken from my active duty pay and retired military pay is $29,061.66. The Army has not denied that these takings will continue indefinitely in the absence of action by the California court.

15. In table form, the takings are as follows:

Sep 84-Dec 84:	760.77	x	4	= 3,043.08
Jan 85-Jun 86:	786.71	x	18	= 14,160.78
Jul 86-Nov 86:	527.48	x	6	= 3,164.88
Dec 86-Mar 87:	544.64	x	4	= 2,178.56
Apr 87-May 87:	529.64	x	2	= 1,059.28
Jun 87-Sep 87:	510.09	x	4	= 2,040.36
Oct 87-Nov 87:	494.26	x	2	= 988.52
Dec 87	326.20	x	1	= 326.20
Jan 88-Jul 88:	300.00	x	7	= 2,100.00
			Total	= $29,061.66

16. I had no evidentiary hearing in which to object to the takings of my pay. In the private sector, family support disputes across State lines are regularly handled under the States' reciprocal support laws, enabling both parties to be heard in their local domestic relations court. I was not afforded an opportunity to be heard in Georgia, as a result of the Army's action, although the Georgia courts were otherwise open to hear my defenses under State reciprocal support enforcement laws. California and Georgia have such laws. I did not appear in the California proceedings which resulted in the orders the government relies on in taking my pay.

17. As mentioned above I have provided support for my daughter even after her whereabouts became unknown to me

in about 1981. My ex-wife has concealed their whereabouts for a number of years going back to then. My contact with them was limited to a post office box and a telephone number she provided. Nevertheless, I continued to send payment in full for support to the post office box and I have my cancelled checks to that effect. Obviously the California orders are based on her unchallenged representations to that court. After the Army started taking my pay in reliance on those orders, I was barely able to support my wife and first son, and discontinued further payments to my ex-wife at that time. The day the Army started taking my pay was the day my wife went into the hospital for the birth of our second son; in February 1989 our third child is due also. After Army retirement, I found myself virtually unemployable and started

a sole practice of law which has included some family law work and familiarity with reciprocal support remedies. Although my practice is growing, I am far from able to conduct legal action in California. At any event such action would be without merit; through relatives I learned that my ex-wife has relocated somewhere in Albuquerque, New Mexico and they provided her telephone number. As before she has revealed no more than a postal box, and I have continued to merely maintain telephonic and written contact with my daughter in lieu of potentially counterproductive confrontation and family litigation. Thus, I cannot reasonably consider action in California, as the Army would have me do.

FURTHERMORE, AFFIANT SAITH NAUGHT.

/s/_____
ARTHUR FRANK MILLARD

Sworn to and subscribed before me,
this 12th day of August 1988
at Atlanta, Georgia.

[SEAL]

/s/_____
Kimberly L. Solomon
Notary Public, Georgia, State at Large
My commission expires: December 2, 1991

IN THE UNITED STATES CLAIMS COURT

ARTHUR FRANK MILLARD,)

Plaintiff)

v) COMPLAINT

THE UNITED STATES,) (Military Pay & Records Correction)

Defendant.) Docket No. 307-88C

FIRST CLAIM

1. The Court has jurisdiction of this claim under the Tucker Act, as amended, 28 USC 1491 et seq.

2. In September 1984 and thereafter, Plaintiff was a U.S. Army Lieutenant Colonel on active duty at Fort Gordon, Georgia and entitled thereby to military basic pay (hereinafter "Pay") under Title 37 U.S.C., Sections 1009 et.seq.

3. The U.S. Army by its agents took Plaintiff's Pay at Fort Gordon, Georgia at times and in amounts as follows:

September 1984 through December 1984:
$760.77 per month
January 1985 through June 1986:
$786.71 per month

4. On 30 June 1986 at Fort Gordon, Georgia was retired from active duty in the U.S. Army , was placed on the U.S. Army retired list effective 1 July 1986, and then became entitled to pay (hereinafter "Retired Pay") under Title 10 USC, Section 3911 and 3911 at his residence in Atlanta, Georgia.

5. The U.S. Army by its agents took Plaintiff's Retired Pay at his said residence in Georgia at times and in amounts as follows:

July through November 1986:
$527.48 per month.
December 1986 through March 1987:
$544.64 per month.
April through May 1987:
$529.64 per month.
June through September 1987:
$510.09 per month.
October and November 1987:
$494.26 per month.
December 1987:
$326.20 per month.
January through April 1988:
$300.00 per month.

6. The total of the Pays and Retired Pays taken as alleged in paragraphs 3 and 5 hereinabove is $28,161.66. Plaintiff had no prior notice of any said takings and no opportunity to be heard or object thereto in any reasonable time, place or manner.

7. From September 1984 and thereafter Plaintiff has timely and repeatedly objected to appropriate agents of the U.S. Army at its successive levels of authority as to the takings in paragraphs 3 and 5 herein, and requested return of all sums so taken. In June 1986 and thereafter Plaintiff petitioned the U.S. Army Board for Correction of Military Records (hereinafter, ABCMR) under 10 USC 1552 for correction of any and all military records relied upon in the actions in paragraphs 3 and 5 above, and

for payment of said sums. In June 1987 the ABCMR notified Plaintiff that relief would not be granted.

8. The U.S. Army's acts as alleged in paragraphs 3,5,6 and 7 herein are arbitrary and capricious, in violation of law and governing regulations and the U.S. Constitution, and are to the prejudice of Plaintiff's Fundamental rights thereunder.

9. In November 1987 and thereafter Plaintiff petitioned the U.S. General Accounting Office (hereafter, GAO) under 31 USC et seq. for payment of the sums in paragraphs 3,5 and 6 above.

10. Upon GAO's failure or refusal to grant relief in a reasonable time and upon Plaintiff's subsequent motion, he is entitled to an Order that the Secretary of

the Army or the ABCMR grant the relief sought in paragraph 7.

SECOND CLAIM

11. Plaintiff realleges and incorporates by reference herein all paragraphs of First Claim herein.

12. The U.S. Army by its aforesaid agents has failed or refused to hear and consider Plaintiff's aforesaid objections and requests, and will continue to take Plaintiff's Retired Pay indefinitely as alleged hereinabove, unless this Court orders the relief requested herein. Other than by this action, Plaintiff has no means by which to cause the U.S. Army to cease and desist from further takings of his Retired Pays as alleged hereinabove.

13. Plaintiff has a wife and minor children whose food, clothing, shelter and other basic needs of life depend upon said Retired Pay, and who will suffer irreparable threat to their means of support if immediate relief is not granted by this Court.

14. Plaintiff is entitled to interlocutory relief, including a temporary restraining order or preliminary injunction, enjoining the U.S. Army and its agents from any further taking of Plaintiff's Retired Pay in the manner alleged herein.

THIRD CLAIM

15. Plaintiff realleges and incorporates by reference herein all paragraphs of First Claim herein.

16. If relief is not granted on First Claim herein, Plaintiff is entitled to Judgment against Defendant in the total amount of Pays and Retired Pays taken as alleged herein ($28,161.66.), plus any of Plaintiff's Retired Pay Defendant may hereafter take in the same manner until Judgment issues, reasonable attorneys fees, and costs of suit.

WHEREFORE, Plaintiff prays for relief as follows:

1. Injunctive relief against the U.S. Army and its agents.

2. An Order that the Secretary of the Army grant relief under 10 USC 1552.

3. Upon motion, Judgment for Pays and Retired Pays wrongfully taken as alleged herein ($28,161.66.), and for any Retired

Pay which Defendant may hereafter wrongfully take until Judgment issues.

4. Judgment for costs of suit.

5 Leave to apply for an order for attorney fees and expenses.

6. Other and further relief deemed fair and just.

Dated May 17, 1988
at Atlanta, Georgia

ARTHUR FRANK MILLARD
Plaintiff
In Propria Personna

Arthur Frank Millard
2090 Brendon Drive, N.E.
Atlanta, Georgia 30338
(404) 395-0431
(404) 393-3267

Title IV-D, Social Security Act provides in part:

PART D -- CHILD SUPPORT AND ESTABLISHMENT OF PATERNITY

42 USC § 651. Authorization of appropriations.

For the purpose of enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, and obtaining child and spousal support, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

42 USC § 652. Duties of Secretary.

(a) Establishment of separate organizational unit; duties

The Secretary shall establish, within the Department of Health and Human Services a separate organizational unit, under the direction of a designee of the Secretary, who shall report directly to the Secretary and who shall--

(1) establish such standards for State programs for locating absent parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective;

*

(3) review and approve State plans for such programs;

*

(8) receive applications from States for permission to utilize the courts of the United States to enforce court orders

for support against absent parents and, upon a finding that (A) another State has not undertaken to enforce the court order of the originating State against the absent parent within a reasonable time, and (B) that utilization of the Federal courts is the only reasonable method of enforcing such order, approve such applications;

42 USC § 653. Parent Locator Service.

(a) Establishment; purpose

The Secretary shall establish and conduct a Parent Locator Service which shall be used to obtain and transmit to any authorized person ... information as to the whereabouts of any absent parent when such information is to be used to locate such parent for the purpose of enforcing support obligations against such parent.

(b) Disclosure of information to authorized persons

Upon request ... of any authorized person ... for the most recent address and place of employment of any absent parent, the Secretary shall... provide ... such information to such person ...

(c) Authorized persons

As used in subsection (a), the term "authorized person" means---

(1) any agent or attorney of any State...

(2) the court which has authority to issue an order against an absent parent for the support and maintenance of a child, or any agent of such court ..."

42 USC § 654. State plan for child and spousal support.

A State plan for child and spousal support must---

(1) provide that it shall be in effect in all political subdivisions of the State;

*

(4) provide that such State will undertake

*

(B) in the case of any child ... to secure support for such child from his parent (or from any other person legally liable for such support) and, at the option of the State, from such parent for his spouse (or former spouse) ... utilizing any **reciprocal arrangements adopted with other States** [emphasis added], (unless the agency administering the plan of the State ... determines ... that it is against the best interests of the child to so so), except that when such arrangements and other means have proven ineffective, the State may utilize the

Federal courts to obtain or enforce court orders for support;

*

(9) provide that the State will, in accordance with standards prescribed by the Secretary, cooperate with any other State--

(C) in securing compliance by an absent parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of the child or children or the parent of such child or children of such parent ...

(19) provide that the agency administering the plan--

(B) shall enforce any such child support obligations which are owed by such an individual but are not being met--

(ii) ... by bringing legal process (as defined in section 662(e) of this title) to require the withholding of amounts from such compensation.

42 USC §§659. Enforcement of individual's legal obligations to provide child support or make alimony payments.

(a) United States and district of Columbia to be subject to legal process

Notwithstanding any other provision of law ... moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the district of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a

private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

*

(f) Non-liablity of United States, disbursing officers, and governmental entities with respect to payments

Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

42 USC 660 Civil action to enforce child support obligations; jurisdiction of district courts

The district courts of the United States shall have jurisdiction, without regard to any amount in controversy, to hear and determine any civil action certified by the Secretary of Health and Human Services under section 652(a)(8) of this title. A civil action under this section may be brought in any judicial district in which the claim arose, the plaintiff resides, or the defendant resides.

42 USC 662. Definitions

For purposes of section 659 of this title--

(e) The term 'legal process' means any writ, order, summons, or other similar process in the nature of garnishment, which--

(1) is issued by (A) a court of competent jurisdiction within any state, territory, or possession of the United States, ...and

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments. P.L.95-30, Title V, Sec.501(d), 91 Stat. 159.

The Uniformed Services Former Spouses' Protection Act provides in part:

10 USC § 1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

*

"(2) 'Court order' means a final (emphasis added) decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree...

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)); or

(iii) division of property (including a division of community property); and

*

(C) specifically provides for the payment of an amount expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) 'Final decree' means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed ...

*

(b) For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order

identify the member concerned and include the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et.seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes **nothing** (emphasis added) on its face that provides reasonable notice that it is issued without authority of law.

(4) A court may not treat the disposable retired or retainer pay of a member (as property under local law) unless the

court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(e)(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659)), both of which provide for payments during a month from the retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, first-serve basis....

P.L.97-252, Title X, Sept. 8, 1982, 96 Stat. 730, codified at 10 U.S.C. 1408, 1447-50, 1072, 1076, 1086 (1982)

Title 5, Code of Federal Regulations, Part 581 (1983) provides in Part:

5 CFR PART 581 -PROCESSING GARNISHMENT ORDERS FOR CHILD SUPPORT AND/OR ALIMONY

581.102(b). "'Governmental entity' means each department, both civilian and military, agency, independent establishment, or instrumentality of the executive branch, including the United States Postal Service, the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, any office, commission, bureau, or other administrative subdivision or creature of the executive branch, and the governments of the District of Columbia and of the territories and possessions of the United States."

581.102(g). 'Legal obligation' means an obligation to pay alimony and/or child

support which is enforceable **under appropriate State or local law** (emphasis added).

581.202(a) A party using this part **shall** (emphasis added) serve on the designated agent of the governmental entity which has moneys due and payable to the obligor, legal process **which names the governmental entity as the garnishee** (emphasis added).

581.305 (a) The governmental entity shall comply with legal process, except where the process cannot be complied with because...it does not, on its face, conform to the laws of the jurisdiction from which it was issued...(and) does not comply with the mandatory provisions of this part...

581.305 (b) Under the circumstances set forth in §§ 581.305 (a), or where the governmental entity is directed by the Justice Department not to comply with the legal process, the entity shall respond directly to the court, or other authority, setting forth its objections to compliance with the legal process. In addition, the governmental entity shall inform the garnishor, or the garnishor's representative, that the legal process will not be honored....

581.305 (f) If a governmental entity receives legal process which, on its face, appears to conform to the laws of the jurisdiction from which it was issued, the entity shall not be required to ascertain whether the authority which issued the legal process had obtained personal jurisdiction over the obligor.

Title 20 Code of Federal Regulations, Parts 350 and 363 (1984)(Railroad Retirement Board) provide in part:

PART 350 - GARNISHMENT OF BENEFITS PAID UNDER THE RAILROAD RETIREMENT ACT AND THE RAILROAD UNEMPLOYMENT INSURANCE ACT

§ 350.1 Authorization for garnishment of benefits paid by the Board.

(a) Annuities ... are subject, in like manner and to the same extent as if the Board were a private person, to legal process brought for the enforcement of legal obligations to provide child support or to make alimony payments.

§ 350.5 Miscellaneous

(e) For purposes of a proceeding under this part, the Board will apply the law of the state in which the legal process is issued unless it comes to the attention of the Board that the state of issuance has no contact with the plaintiff or

defendant in the action; in which case the Board may, in its sole discretion, apply the law of any state with significant interest in the matter.

PART 363 - GARNISHMENT OF REMUNERATION OF BOARD PERSONNEL

§ 363.1 Authorization for garnishment of remuneration for employment paid by the Board.

(a) Remuneration for employment paid or payable by the Board is subject, in like manner and to the same extent as if the Board were a private person, to legal process brought for the enforcement of legal obligations to provide child support or to make alimony payments.

§ 363.5 Miscellaneous (e) For purposes of a proceeding under this part, the Board

will apply the law of the state in which the legal process is issued unless it comes to the attention of the Board that the state of issuance has no contact with the plaintiff or defendant in the action; in which case the Board may, in its sole discretion, apply the law of any state with significant interest in the matter.

Title 32, Code of Regulations, Part 63 (1985) provides in part:

63.3(1) **Garnishment.** The legal procedure through which payment is made from an individual's pay that is due or payable to another party in order to satisfy a legal obligation to provide child support, to make alimony payments, or both, under

5 CFR Part 581 and 42 U.S.C. 659 or to enforce a division of property other than a division of retired pay as property under 10 U.S.C. 1408(D)(5).

63.6 (f) Notification of Member.

(1) As soon as possible... the designated agent shall send written notice to the affected member.

*

(3) If the member responds to the notification, the designated agent shall consider the response and will not honor the court order whenever it is shown that the court order is defective or the court order is modified, superseded, or set aside.

Title 45, Code of Federal Regulations Parts 301 and 302 (1983) provide in part:

PART 301 - STATE PLAN APPROVAL AND GRANT PROCEDURES

301.0 Scope and applicability of this part. This part deals with the administration of title IV-D of the Social Secuity Act by the federal Government including actions on the State plan ...

301.1 General definitions.

The "State plan" means the state plan for child and spousal support under section 454 of the Act.

PART 302 - STATE PLAN REQUIREMENTS

302.36 **Cooperation with other States.** The State plan shall provide that the State will cooperate with any other State;

*

(c) In securing compliance by an absent parent who is present in the State with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of a child or children of such parent and of the spouse (or former spouse) of such parent ... with whom the child or children are living and with respect to whom aid is being provided under the plan approved under title IV-A of the Social Security Act in any other State; and,

(d) In carrying out any other function required under a plan approved under title IV-D.

Title 45, Code of Federal Regulations Part 303 (1986) provides in part:

303.100 (g) Interstate withholding.

(1) The State law must provide for procedures to extend the State's withholding system so that the system will include withholding from income or wages derived within the State in cases where the applicable support orders were issued in other States.

*

(5) The State in which the absent parent is employed must:

(i) Provide notice to the absent parent...

(6) The withholding must be carried out in full compliance with all procedural due process requirements **of the State in which the absent parent is employed.** (emphasis added). 50 F.R., No. 90, pp. 19611,19612, May 9, 1985.

Congressional Record-House, December 20, 1974, p.41810, provides in part:

Mr. TAYLOR of North Carolina. Mr. Speaker, I assume the gentleman is familiar with our reciprocal nonsupport statutes which are in effect in practically all the States in the Union.

Mr.ULLMAN. Reciprocal nonsupport statutes, yes.

Mr. TAYLOR of North Carolina. Under these statutes, the wife can go into the domestic relations court in her home jurisdiction; she files her complaint and she can present her testimony. Papers are then served on the husband in the domestic relations court in the jurisdiction where he resides. It is necessary to know where he is. It is not useful at all if he cannot be located.

Mr. ULLMAN. Right.

Mr. TAYLOR of North Carolina. The court there in the husband's jurisdiction hears his testimony and then enters a judgment directing payment of certain sums to made to the clerk of courts in the wife's jurisdiction.

Mr. ULLMAN. Right.

Mr. TAYLOR of North Carolina. Then she can go into the court there and collect her money each week. This legislation does not in any way change that law, does it?

Mr. ULLMAN. No, it does not..."

South Carolina Statutes provide in part:

"Sec.15-39-420. Withholding of wages pursuant to foreign garnishment proceeding prohibited under certain circumstances.

(1) No employer in this State shall withhold any portion of the wages of any employee residing in this State as a result of any garnishment proceedings brought in any court outside of this State unless the creditor first obtains a judgment against such employee growing out of the same indebtedness for which the garnishment proceedings were instituted in a court of competent jurisdiction in South Carolina. The burden of proving the competent jurisdiction of the court shall rest upon the creditor.

(2) The provisions of this section shall not apply to any debt incurred outside the State of South Carolina by

South Carolina Statutes (continued):

such employee nor shall there be any garnishment of earnings for personal services rendered by the employee regardless of where the debt was incurred.

(3) Any employer violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one thousand dollars.

California Civil Code provides in part:

§ 4701. [(Effective until January 1, 1987) Wage Assignment for Child Support]

(a) In any proceeding where the court has ordered either or both parents to pay any amount for the support of minor child, the court may order either parent or both parents to assign to the county clerk, probation officer, or other officer of the court or county officer designated by the court to receive the payment, that portion of salary or wages of either parent due or to be due in the future as will be sufficient to pay the amount ordered by the court for the support, maintenance, and education of the minor child. The order shall operate as an assignment and shall binding upon any existing or future

§ 4701 California Civil Code (continued):

employer of the defaulting parent upon whom a copy of the order is served. Any such order may be modified or revoked at any time by the court.

(b)(1) Notwithstanding the provisions of subdivision (a), in any proceeding where the court has ordered either or both parents to pay any amount for the support of a minor child, upon a petition signed under penalty of perjury by the person or county officer to whom support has been ordered to have been paid that the parent so ordered is in arrears in payment in a sum equal to the amount of one month of the payment within the 24-month period immediately preceding filing of the petition with the court, the court shall issue without notice to the parent ordered to pay support an order requiring the

§ 4701 California Civil Code (continued):

parent ordered to pay support to assign either to the person to whom support has been ordered to have been paid or to a county officer designated by the court to receive the payment, that portion of the salary or wages of the parent due or to be due in the future as will be sufficient to pay the amount ordered by the court for the support, maintenance, and education of the minor child. Such an order shall operate as an assignment and shall be binding upon any existing or future employer of the parent ordered to pay support upon whom a copy of the order is served.

*

(2) No petition shall be accepted for filing pursuant to this subdivision unless it contains a declaration stating that the

§ 4701 California Civil Code (continued):

parent to whom support has been ordered to be paid has given the parent ordered to pay support a written notice of his or her intent to seek a wage assignment in the event of a default of support payments and that notice was transmitted by certified mail or personally served at least 15 days prior to the date of the filing of the petition.

*

(3) The parent to whom support has been ordered to be paid shall notify the ... employer of the parent ordered to pay support, by any form of mailing requiring a return receipt, of any change of address within a reasonable period of time after any such change.... If the employer ... is unable to deliver payments under the assignment for a period of six months due

§ 4701 California Civil Code (continued):

to the failure of the person to whom support has been ordered to be paid to notify the employer ... of a change of address, the employer or county officer shall not make any further payments under the assignment and shall return all undeliverable payments to the employee.

(4) An assignment order made pursuant to this subdivision shall not become effective until 10 days after service of the order on an employer.

(5) Within 10 days of service of an assignment order issued pursuant to this subdivision on an employer, the employer shall deliver a copy of the assignment order to the parent ordered to pay support.

(6) A parent alleged to be in default may move to quash an assignment order issued under this subdivision within 10 days

§ 4701 California Civil Code (continued):

after service on the parent of notice of the assignment order by his or her employer if the parent states under oath that a default in the amount alleged in the petition has not occurred within the 24-month period referred to in the petition or that the amount is not owed. The motion and notice of motion to quash the assignment order shall be filed with the court issuing the assignment order within 10 days after service on the parent of notice of the order by the employer. The clerk of the court shall set the motion to quash for hearing within not less than 15 days, nor more than 20 days, after receipt of the notice of motion and shall mail to the petitioner at the return address contained in the petition a copy of the notice of motion by first-class

§ 4701 California Civil Code (continued):

mail within five days after receipt of the notice of motion.

(7) The employer shall continue to withhold and forward support as ordered by the court until served with notice that the motion to quash under this subdivision has been granted.

*

(9) For purposes of this subdivision, arrearages of payment shall be computed on the basis of the payments owed and unpaid on the date that the parent ordered to pay support has been given notice of the order of assignment and the fact that the parent ordered to pay support may have subsequently paid such arrearages shall not relieve the court of its duty under this subdivision to order the assignment.

§ 4701 California Civil Code (continued):

(10) Upon petition by the parent ordered to pay support, the court shall terminate an order of assignment entered pursuant to this subdivision upon proof of full payment pursuant to the wage assignment for the appropriate period of time, as follows:

(A) An assignment pursuant to this subdivision pursuant to an initial petition shall continue until support payments are current.

(B) An assignment under this subdivision pursuant to a second petition filed within 24 months shall continue for 12 months.

(C) An assignment under this subdivision pursuant to a third petition filed within 48 months shall continue for 18 months.

Upon petition by the parent ordered to pay support the court shall terminate an order

§4701 California Civil Code (Continued):

of assignment entered pursuant to this subdivision if the employer or county officer has been unable to deliver payments under the assignment for a period of three months due to the failure of the person to whom support has been ordered to be paid to notify the employer or county officer of a change of address.

(c) The Judicial Council shall prescribe forms for the orders for wage assignment required or authorized by this section. The employer may deduct from the salary or wages of the employee the sum of one dollar ($1) for each payment made pursuant to the order. Any such assignment made pursuant to court order shall have priority as against any attachment, execution, or other assignment, unless otherwise ordered by the court.

§4701 California Civil Code (Continued):

(d) The employer shall cooperate with and provide relevant employment information to the district attorney for the purpose of enforcing the child support obligation.

(e) No employer shall use any assignment authorized by this section as grounds for the dismissal of such employee.

(f) As used in this section "employer" includes the United States government and any public entity as defined in Section 811.2 of the Government Code.

(g) On declaration or affidavit of the parent to whom support has been ordered to be paid to the court that: (1) the parent ordered to make support payments is in default in such payment in the amount specified in subdivision (b), and (2) the whereabouts of the defaulting parent or the identity of his employer are unknown

§ 4701 California Civil Code (continued): to the parent to whom support has been ordered to be paid, the district attorney shall contact the central registry maintained by the Department of Justice in the manner prescribed in Section 11478.5 of the Welfare and Institutions Code, and upon receiving the requested information, notify the court of the last known address of the absent parent and the name and address of the absent parent's last known employer. The court shall then order the defaulting parent to make support payments pursuant to subdivision (b).

(h) Nothing in this section shall limit the authority of the district attorney to utilize any and all civil and criminal remedies to enforce child support obligations regardless of whether or not the custodial parent receives welfare moneys.

§4701 California Civil Code (Continued):

(j) Notwithstanding any other provision of law, when a certified copy of any order of assignment is served on any public entity described in Section 704.110 of the Code of Civil Procedure other than the United States government, that entity shall comply with any request for a return of employee contributions by an employee named in the order by delivering the contributions to the clerk of the court from which the order issued, unless the entity has received a certified copy of an order terminating the order of assignment. Upon receipt of moneys pursuant to this section, the clerk of the court, within 10 days, shall send written notice of that fact to the parties, and any agency through whom payments have been ordered under Section 4702. These moneys shall be

§4701 California Civil Code (Continued):

subject to any procedure available to enforce an order for child support, but if no enforcement procedure is commenced after 30 days have elapsed from the date the notice of receipt is sent, the clerk shall, upon request, return the moneys to the public entity that delivered the moneys to the court unless the public entity has informed the court in writing that the moneys shall be released to the defaulting parent. A court shall not directly or indirectly condition the issuance, modification, or termination of, or condition the terms or conditions of, any order for the support of a minor child upon the issuance of such a request by such an employee.

Official Code of Georgia Annotated (O.C.G.A.) provides in part:

9-11-58. Entry of judgment.

(a) Signing. Except when otherwise specifically provided by statute, all judgments shall be signed by the judge and filed with the clerk.

(b) When judgment entered. The filing with the clerk of a judgment, signed by the judge, constitutes the entry of the judgment, and, unless the court otherwise directs, no judgment shall be effective for any purpose until the entry of the same, as hereinbefore provided...

9-11-60. Relief from judgments.

(a) Collateral attack. A judgment void on its face may be attacked in any court by any person....

*

O.C.G.A. (Continued)

(d) Motion to set aside. A motion to set aside must be predicated upon some nonamendable defect which does appear upon the face of the record or pleadings, unless the defect involves a jurisdictional error, in which case a motion to set aside shall lie to attack a judgment based upon lack of jurisdiction over the person or subject matter, regardless of whether such lack of jurisdiction appears upon the face of the record or pleadings....

*

(f) Procedure; time of relief. Reasonable notice shall be afforded the parties on all motions. Relief in equity must proceed by the complaint and summons. A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time.

O.C.G.A. (Continued)

9-12-16. Absent jurisdiction, judgment a nullity.

The judgment of a court having no jurisdiction of the person or the subject matter or which is void for any other cause is a mere nullity and maybe be so held in any court when it becomes material to the interest of the parties to consider it.

18-2-51 Foreign assignments to conform with laws of state.

No property in this state shall pass under any assignment made by corporations, persons, or firms out of this state unless such foreign assignment shall conform to the law of assignments in this state.

Supreme Court, U.S.
FILED
APR 17 1991
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No. 90-1276

In the Supreme Court of the United States

OCTOBER TERM, 1990

ARTHUR FRANK MILLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may recover from the United States moneys that were garnished, pursuant to 42 U.S.C. 659, from his military and retirement pay and paid over to his former wife under a facially valid California child-and-spousal-support order.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-44a, is reported at 916 F.2d 1. The opinion of the Claims Court, Pet. App. 49a-73a, is reported at 16 Cl. Ct. 485.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1990. A petition for rehearing was denied on November 13, 1990. Pet. App. 46a-47a. The petition for a writ of certiorari was filed on February 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a retired Lieutenant Colonel of the United States Army. On December 9, 1983, while petitioner was still in the Army, his former spouse obtained an order of arrearage for child and spousal support from the California Superior Court in San Francisco. Prior to the entry of the order, petitioner was personally served and provided with an opportunity to appear for a hearing, but did not do so. Subsequently, petitioner's former spouse obtained a wage assignment order from the California court. The order assigned a portion of petitioner's salary or wages and made it payable to petitioner's former spouse in the amount of $300 per month for child support, plus $700 per month for 21 months in satisfaction of petitioner's $14,414 arrearage. Pet. App. 8a-9a, 75a-80a.

The wage assignment order was served upon the United States Army, petitioner's employer. In compliance with the order and 42 U.S.C. 659, the Army began making deductions from petitioner's monthly pay effective October 1, 1984.[1] At that time, petitioner was on active duty in Georgia. Although petitioner received notice of the garnishment from the

---

[1] Garnishment of the wages of federal employees for alimony and child support payments is authorized by 42 U.S.C. 659, which provides, in pertinent part:

> Notwithstanding any other provision of law * * * moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States * * * to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States * * * were a private person, to legal process brought for the enforcement against such individual of his legal obligations to provide child support or make alimony payments.

government in early October 1984, the first deduction was made before he received such notice. At no time, however, did petitioner attempt to challenge the arrearage or wage assignment orders in the California courts. Pet. App. 10a, 35a, 51a-52a.

Instead, petitioner attacked the deductions before the Army Board for Correction of Military Records. That body ruled that the Army was required by 42 U.S.C. 659 to honor the wage assignment order, and it advised petitioner that his challenge had to be made in the Superior Court of California. Nevertheless, petitioner continued his collateral attack upon the California court orders, first before the Comptroller General, then in the courts below. Pet. App. 10a, 54a.

2. In May 1988, petitioner instituted this action in the United States Claims Court, seeking to recover moneys garnished from his active duty and retirement pay and paid to his former wife under the California court orders. The Claims Court granted the government's motion for summary judgment, and dismissed the complaint. The Claims Court noted that 42 U.S.C. 659(f) provides that the United States is not liable for any garnishment payment made "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." The court rejected petitioner's two main contentions that subsection (f) was not applicable here. Pet. App. 56a, 60a, 66a-71a, 73a.

First, the court concluded that, contrary to petitioner's view, the California order satisfied the requirement of being "regular on its face." Citing *United States* v. *Morton*, 467 U.S. 822 (1984), the court stated that to qualify as "regular on its face,"

the order must simply be "legal process whose validity, facially judged, appears to evidence a legitimate exercise of jurisdiction on the part of the issuing authority." Pet. App. 60a-61a. Applying that principle, the court found the order to be valid because nothing on its face "provides reasonable notice that it was issued without authority of law"; rather, the order bore all the indicia of an authentic, valid court order. *Id.* at 61a-66a.

Next, the court rejected petitioner's claim that certain alleged violations of 42 U.S.C. 659 and its implementing regulations exposed the United States to liability for honoring the garnishment order. The court concluded that the order adequately identified the United States as its recipient under the applicable regulation, 5 C.F.R. 581.202(a), and it held that the government's failure (if any) to comply with 42 U.S.C. 659(d) by giving petitioner notice within 15 days after the garnishment order was served on it did not cause any prejudice to petitioner. Pet. App. 66a-71a.

3. The Federal Circuit affirmed. The court noted that two issues were raised by petitioner's claim that the government improperly withheld wages and retirement pay under a garnishment order. First, the court stated that, because 42 U.S.C. 659(a) establishes the government's obligation to comply with a garnishment order "in like manner and to the same extent as if the United States * * * were a private person," petitioner had to establish that the government, as garnishee, "would be liable to the plaintiff under state law" for having complied with the writ. Pet. App. 14a.[2] Second, the court said, if state law

[2] The court explained: "[T]he government cannot be held liable in a suit for the wages paid or not paid under the

did not protect the government, the government may nevertheless be immune from liability "because of the exculpatory provision, [42 U.S.C.] 569(f)." *Ibid.*[3]

Although, in the court's view, the record here did not establish that the express immunity in 42 U.S.C. 659(f) was available, the court rejected petitioner's claim because in the circumstances of this case, California law would not have imposed liability on a garnished private employer. Pet. App. 12a-13a, 16a-17a, 41a-44a.

The court began by finding that the wage assignment order was "regular on its face." After attempting to structure petitioner's "confusing array of arguments," the court determined that the order was not void for failing to reveal whether the California court had personal jurisdiction over petitioner, that the United States was amenable to the jurisdiction of the California courts for garnishment purposes, and that the United States' compliance with a facially

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[garnishment] writ in circumstances in which a private employer would not be held liable. If state law exculpates an employer, that ends the challenge against the United States as far as any claim based on garnishment principles [is concerned]." Pet. App. 14a.

[3] The court explained that Section 659(f) largely parallels the protection available to a garnishee under state law. Under generally applied state law, "an employer who honors a writ 'regular on its face' issued by a court of competent jurisdiction, who is properly served, and who gives notice to the employee so that the employee may timely challenge the garnishment has no further duty to the employee." Pet. App. 16a-17a (footnote omitted). Section 659(f) generally embodies those requirements, but the provision "is narrower in that the statutory immunity * * * is also conditioned on the government's compliance with" the provision and its implementing regulations. Pet. App. 18a.

valid garnishment order did not raise due process concerns.[4] Pet. App. 19a-25a.

The court also rejected petitioner's contention that the wage assignment order did not comply with 5 C.F.R. 581.202(a) because it named the "employer" as garnishee, rather than specifically naming the Army as the governmental entity to be garnished. The court explained that because California law includes the United States as an "employer," the government's conclusion that its regulation was satisfied by a wage assignment order directed to the "employer" was reasonable. Pet. App. 29a-30a.

Finally, the court found that for purposes of the government's motion for summary judgment, the present record did not establish that the government had complied with the requirement of 42 U.S.C. 659 (d) that notice be given to the employee within 15 days after the government was served with the garnishment order. But the court concluded that because petitioner received notice shortly thereafter, and had never sought relief in the California court even after receiving notice, he was not prejudiced by the late notice. Pet. App. 32a-35a. Absent prejudice, "the United States would, * * * like any other employer, not be liable to its employee under state law." *Id.* at 41a.

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[4] The court explained that any of petitioner's "due process rights in having a money judgment entered against him, if violated, would have been violated by the California court that issued the order[,] not the United States which merely complied with the order as it was required to do." Pet. App. 25a. The court added that "it is undisputable that the California court provide[d] full opportunity for [petitioner] to challenge the arrearage judgment and would, in addition, have entertained a motion to quash the wage assignment." Pet. App. 25a-26a. Petitioner, however, "simply failed to avail himself of his rights." *Id.* at 26a.

ARGUMENT

The Claims Court and the Federal Circuit took different routes to their decisions, but each court found that the United States had acted properly in making deductions from petitioner's pay and retirement checks pursuant to a California state court wage assignment order. The Claims Court concluded that the United States was expressly immunized from liability under 42 U.S.C. 659(f), while the Federal Circuit concluded that under conventional state law principles of garnishee liability, the Army acted properly by giving petitioner notice of, and honoring, a state court garnishment order that was "regular on its face." Despite petitioner's myriad of arguments to the contrary, the decision below rejecting his collateral attack on the state court garnishment order is correct and presents no issue worthy of this Court's review.

1. In 1974, Congress lifted the sovereign immunity of the United States to allow garnishment of the wages of federal employees and retirees for specific purposes. As one of several measures taken to facilitate the collection of alimony and child support, Congress enacted 42 U.S.C. 659, which partially waives soverign immunity and allows garnishment of federal salaries, pursuant to "legal process" to collect alimony and child support payments, "in like manner and to the same extent as if the United States * * * were a private person." 42 U.S.C. 659(a).[5] The purpose of Section 659 is "to remedy the plight of persons left destitute because they had

[5] The term "legal process" is defined to mean "any writ * * * or other similar process in the nature of garnishment" that, among other things, "is issued by * * * a court of competent jurisdiction." 42 U.S.C. 662(e)(1).

no speedy and efficacious means of ensuring that their child support and alimony would be paid." *United States* v. *Morton*, 467 U.S. at 833.[6]

Three years later, Congress added subsection (f) to Section 659; this subsection provides that neither the government nor its disbursing officers may be held liable for amounts paid "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." 42 U.S.C. 659(f) (added by Tax Reduction and Simplification Act of 1977, Pub. L. No. 30, Tit. V, § 501(a), 91 Stat. 157). In *Morton*, this Court held that under 42 U.S.C. 659(f), the United States could not be held liable for honoring a garnishment writ regular on its face and issued by a court with subject matter jurisdiction, whether or not the issuing court actually had personal jurisdiction over the defendant in a particular case. 467 U.S. at 834-836. The Court explained that "[i]nquiry into the issuing court's jurisdiction over the debtor cannot be squared with the plain language of the statute, which requires the recipient of the writ to act on the basis of the 'face' of the process." *Id.* at 829.

As the Federal Circuit pointed out, although subsection (f) provides one source of immunity from liability, "the government need not resort to exculpation under Section 659(f) if it would not be liable to its

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[6] Under 42 U.S.C. 661, the Office of Personnel Management has issued regulations implementing Section 659. These regulations provide that federal disbursing agents must comply with a writ of garnishment, except in certain enumerated circumstances, such as where there are jurisdictional defects apparent on the face of the order of garnishment or where the garnishment is not for alimony or child suport. 5 C.F.R. 581.305(a)(1). None of those enumerated circumstances for disregarding a garnishment writ exists, or is alleged to exist, in this case.

employee under state law." Pet. App. 18a. The court explained that this was so because Section 659(a) "subjects the United States to liability in connection with garnishment only 'in like manner and to the same extent as if the United States were a private person.'" *Ibid.* Because Section 659(a) obligates the United States to honor a writ of garnishment to the same extent that state law requires a private person to do so, if the United States complies with that provision, it has fully discharged its salary obligations to an employee, and cannot be held liable for improperly withholding salary payments. See *United States v. Morton*, 467 U.S. at 832-833.

2. In this case, petitioner makes a variety of attacks on the government's decision to honor the garnishment order of the California court, but fails to come to grips with the essence of the holding below: because the government acted in compliance with California law in honoring the garnishment writ, it fully discharged its "debt" to petitioner. Petitioner's claim (Pet. 39-41) that a similarly situated private employer would be liable on the facts of this case rests entirely upon his contention that the garnishment order is void under California law, and therefore unenforceable. But California law does not render the garnishee responsible for the validity of an order underlying a writ of garnishment; rather, as the court of appeals explained (Pet. App. 17a), "[t]he employer's payment of wages due the employee in accordance with the order of such court discharges the employer's debt to the employee."[7] Petitioner's ob-

[7] Generally established principles of garnishment reflect the same rule. See *Morton*, 467 U.S. at 832 ("It has long been the rule that at least when the obligor receives notice of the garnishment, the garnishee cannot be liable for honoring a

jections to the validity of the support enforcement orders must be raised before the court that issued them—not in an action against the United States for the moneys garnished. As the court of appeals correctly noted, petitioner had an adequate opportunity to challenge the California judgment assigning his wages, but "simply failed to avail himself of his rights." *Id.* at 26a.[8]

The wage assignment order was not irregular on its face simply because it was made against a nonresident. Pet. 22, 26-28. To contend otherwise resurects the claim rejected in *Morton* that the government must ascertain whether the court had personal jurisdiction over the debtor before complying with a writ of garnishment. In this era of "ubiquitous long-arm statutes," Pet. App. 21a, there are any number of bases for a state court to gain personal jurisdiction over a nonresident.[9] The United States is not required

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writ of garnishment. See *Harris* v. *Balk*, 198 U.S. 215, 226-227 (1905).").

[8] For that reason, this case does not present the issue reserved in *Morton*, 467 U.S. at 827 n.5, with respect to a debtor's rights against the United States where the debtor did not have an adequate opportunity to challenge the jurisdiction of the court issuing the garnishment order. Petitioner contends (Pet. 30-34) that he lacked an adequate opportunity because of the difficulty he would have in traveling from Georgia to California. But petitioner does not explain why a special appearance to contest personal jurisdiction would not provide an adequate opportunity to vindicate his claim. See *Kulko* v. *Superior Court*, 436 U.S. 84 (1978) (upholding nonresident's due process objections to jurisdiction, after nonresident made a special appearance).

[9] California, like other jurisdictions, has long-arm statutes. Pet. App. 21a, citing Cal. Civ. Proc. Code § 410.10 (West 1984). Many nonresidents will have the requisite "mini-

to look behind every garnishment order involving an out-of-state debtor to determine whether personal jurisdiction was wanting.

Petitioner also argues (Pet. 22-25) that the wage assignment order was not regular on its face because it did not specifically name the United States. Under 5 C.F.R. 581.202, a garnishment order served on the government is to "name[] the government entity as the garnishee." But even though the garnishment order here did not specifically name the United States as petitioner's employer, California law expressly defines "employer" to include the United States, Pet. App. 29a, and the garnishment order was directed to petitioner's "employer." *Id.* at 79a. The Army's reading of its regulation to encompass the reference involved here is entitled to "substantial deference." *Martin* v. *Occupational Safety & Health Review Comm'n*, No. 89-1541 (Mar. 20, 1991), slip op. 5; *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1985). In any event, as a result of this litigation the Office of Personnel Management (OPM) has issued a proposed rule clarifying the regulation "to make it absolutely clear that the Governmental entity need not be expressly named as the garnishee and thereby to avoid any future litigation on this issue." Summary, Proposed Rule, Processing Garnishment Orders for Child Support and/or Alimony, 56 Fed. Reg. 9181 (Mar. 5, 1991).[10]

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mum contacts" under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), to support personal jurisdiction in California.

[10] Under 42 U.S.C. 662(e)(2) legal process, for purposes of Section 659, means an order "directed to, and the purpose of which is to compel, a government entity" to garnish wages. That provision does not specifically require naming

Finally, the court of appeals correctly held that any violation of the notice provision of 42 U.S.C. 659(d) did not entitle petitioner to recover the garnished funds from the United States. Because there was compliance with the notice requirement as to all but the first deduction, 42 U.S.C. 659(f) provides a complete defense to all but the first $760.77 deducted before notice was provided. As the court of appeals concluded, Pet. App. 35a, it is "untenable" to argue that a failure to give timely notice of the first deduction made all subsequent deductions wrongful even though the lack of notice had been cured. Cf. *United States* v. *Montalvo-Murillo*, 110 S. Ct. 2072, 2079-2080 (1990). In any event, as both courts below found, because petitioner never sought any relief with respect to the garnishment order in the California courts, he was not prejudiced in any respect by the slight delay in receiving notice. Pet. App. 34a-35a, 70a-71a.[11]

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of the governmental employer in the order, and OPM's interpretation of the statute to contain no such requirement is a reasonable one. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

[11] As in the Claims Court, Pet. App. 72a n.7, and in the Federal Circuit, *id.* at 11a, petitioner's submission here raises "a plethora of issues dependent on various facts," *ibid.*, including claims that the California Civil Code is unconstitutional (Pet. 29); that 42 U.S.C. 659 unconstitutionally denies petitioner "access to the courts," substantive due process, and equal protection (Pet. 34, 36-37); and that payment of funds under the writ of garnishment here violates the Appropriations Clause of Article I of the Constitution (Pet. 39). Those claims do not warrant review. See also Sup. Ct. R. 14.5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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